

MAR 6 1969

JOHN F. DAVIS, CLERK

SINGLE APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 791

RONALD L. CRANE,

Petitioner,

vs.

**CEDAR RAPIDS AND IOWA CITY RAILWAY
COMPANY,**

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF IOWA**

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RELEVANT DOCKET ENTRIES

Petition at Law—October 26, 1964.

Amended and Substituted Petition at Law—January 22, 1965.

Answer—July 28, 1965.

Reply—November 5, 1965.

Trial Court's Letter Requesting Pre-Trial Conference and Questions to be Discussed—December 30, 1966.

Plaintiff's Pre-Trial Conference Memorandum—January 6, 1967.

Pre-Trial Conference—January 6, 1967.

Order on Pre-Trial Conference—January 10, 1967.

Defendant's Amended and Supplemental Answer—January 13, 1967.

Plaintiff's Reply to Defendant's Amended and Supplemental Answer—January 20, 1967.

Final Order—January 23, 1967.

Verdict—February 1, 1967.

Judgment—February 1, 1967.

Notice of Appeal—February 24, 1967.

Verdict and Judgment Affirmed by Supreme Court of Iowa
—September 5, 1968.

(District Court of Linn County, Iowa.)

RONALD L. CRANE,

Plaintiff,

vs.

CEDAR RAPIDS AND IOWA CITY RAILWAY
COMPANY, a Corporation,

Defendant.

ABSTRACT OF RECORD

(Page 4, line 27, to page 22, line 8:)

[4]*

PETITION AT LAW

(Filed in District Court October 26, 1964.)

AMENDED AND SUBSTITUTED PETITION AT LAW

[5] (Filed in District Court January 22, 1965; further amended by Order on Pre-Trial Conference, paragraph 19, dated January 10, 1967, granting plaintiff's Motion to Amend Plaintiff's Petition, which Motion was submitted at the January 6, 1967 pre-trial and filed January 10, 1967.)

(Note: The petitions, amendments and responsive pleadings thereto contained three Counts. Count I was based on negligence, Count II on violation of Title 45, United States Code, Section 2, and Count III on Res Ipsa Loquitur. Only Count II was submitted to the jury, and only Count II is involved in this appeal. Where reallegations were incorporated by reference into Count II from Count I, the original allegation is set forth below.)

*[Figures in brackets refer to page numbers of the Abstract of Record in appeal to Supreme Court of Iowa.]

COUNT TWO

I.

That defendant is a corporation organized and existing under the laws of the State of Iowa with its principal place of business in Cedar Rapids, Iowa; that defendant is and was at all times hereinafter named [6] engaged in the business of commerce as a common carrier by railway, and as such engaged in interstate commerce; that at all times hereinafter mentioned plaintiff was engaged in interstate commerce, and his duties were in the furtherance of interstate commerce, and directly or closely and substantially affected such commerce.

II.

That on or about March 20, 1963, defendant delivered and set out on a spur track servicing an elevator of Cargill Inc. in Cedar Rapids, Iowa, a number of empty boxcars, said cars to be unloaded with meal by Cargill Inc.

III.

That on and prior to March 21, 1963, plaintiff was employed by Cargill Inc. at Cedar Rapids, Iowa, as a mill helper; that as such it was his duty to load meal into railroad cars so delivered by defendant to said company's elevator, in said city and state; that as part of his duties plaintiff was required, for the purpose of weighing and "spotting" at the proper loading doors, [7] to be and work upon, around and about, railroad cars delivered to Cargill Inc. by the defendant, and to control the movement thereof by the use of an electric winch with cables and the handbrakes of said cars; that plaintiff was invited and expected by defendant to work with, upon and control the movement of the railroad cars so delivered by defendant.

IV.

That on or about March 21, 1963, at approximately 1:00

a.m., plaintiff was engaged in the scope and course of his employment, performing his customary duties as described in Paragraph III herein; that at said time a co-employee of plaintiff's uncoupled the two northerly cars from said string of empty cars and with the use of said winch and cables moved said cars approximately 150 to 200 feet north to a scale, where said cars were weighed and then moved back by said means to said string of cars; that the cars so weighed collided with the stationary string of cars with sufficient force to push said string of cars a few feet in a southerly direction; that at about 4:00 a.m. on said [8] day, after loading the most northerly car, said co-employee of plaintiff attempted to "spot" the second most northerly car at the loading dock; that said co-employee attached said cables to the second most northerly car while plaintiff boarded the third most northerly car and prepared to control the movement of said string of cars by applying the handbrakes of said car; that when said winch was turned on the two most northerly cars were pulled away from the string of cars to which they were supposedly coupled, and towards Cargill's elevator shed where other men were working in a boxcar; that plaintiff applied the brakes on the car upon which he was stationed, dismounted, ran after and climbed upon the southerly car of the two uncoupled, moving cars, and attempted to stop said cars before they collided with the car at the elevator shed; that while so attempting plaintiff fell from said car and landed between the rails of the tracks upon which said cars were moving and sustained the injuries hereinafter described.

V.

That defendant, knowing that the [9] cars would be so moved, used and controlled, furnished cars in said string of cars with which plaintiff was working equipped with couplers which failed to couple automatically by impact or which

failed to stay coupled until released by some purposeful act, in violation of Title 45, U. S. Code, Section 2.

VI.

(Withdrawn and struck by Order on Pre-Trial Conference.)

VII.

That as a result, in whole or in part, of the violation of said Title 45, United States Code, Section 2, plaintiff was permanently and severely injured in body and mind and was made to suffer, and will continue to suffer, great bodily pain; that he was caused to be violently shaken, jarred and injured; that he was caused to sustain violent, severe and permanent injuries to both his left and right feet, ankles and legs, and to the muscles, nerves, tendons and ligaments contiguous to and a part thereof; that plaintiff was [10] caused to sustain numerous abrasions and contusions to his body, and upon information and belief alleges permanent injury to the skeletal structures of the right leg.

VIII.

That the aforesaid injuries were caused solely by the negligence of defendants, its agents, servants and employees, and without any negligence on the part of plaintiff contributing in any way thereto. (Note: Paragraph VIII effectively withdrawn by Plaintiff's Pre-Trial Conference Memorandum, Question No. 21.)

IX.

That in an effort to treat and relieve himself of said injuries, plaintiff was caused and required to be hospitalized and undergo surgical intervention in an attempt to alleviate his pain and suffering, and plaintiff has incurred, and in the future will incur, expenses amounting to a considerable amount of money for surgical and medical treatment, hospitalization and nurses expense, and for drugs and other

supplies, the exact amount of which the plaintiff is unable to accurately estimate and determine at this time, all to [11] plaintiff's special damage.

X.

That prior to receiving said injuries, plaintiff was a strong, able-bodied man, and at said time was employed by the defendant Cargill, Inc. as a mill-helper; that at the time of sustaining said injuries, plaintiff was twenty-two (22) years of age and was then capable of earning a wage of Four Thousand and 00/100 (\$4,000.00) Dollars a year or more; that since sustaining said injury, and as a proximate result thereof, the plaintiff has been unable to perform his work and duties for said employer, and that due to the persistent and disabling nature of plaintiff's injuries and its attending suffering, plaintiff states upon information and belief that he will be unable to perform said work and duties for said employer in the future, and that plaintiff has, and therefore will, suffer loss of time and wages, and his earning capacity has been forever greatly diminished and impaired; that since sustaining said injuries, the plaintiff's normal day-to-day activities and personal [12] hobbies and habits have been grossly restricted, and that said activities, hobbies and habits will in the future be restricted and limited.

XI.

That by reason of the facts hereinbefore alleged, plaintiff has suffered special and general damages at the hands of the defendant in the sum of Two Hundred Thousand and 00/100 (\$200,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Two Hundred Thousand and 00/100 (\$200,000.00) Dollars, together with all of his costs and disbursements herein.

(District Court of Linn County, Iowa.)

ANSWER

(Filed in District Court July 28, 1965.)

Comes now the defendant, Cedar Rapids and Iowa City Railway Company, and, by way of answer to the Amended and Substituted Petition at Law of the plaintiff, states:

DIVISION II

[13] By way of answer to Count II of plaintiff's Amended and Substituted Petition at Law, defendant states:

1. Answering paragraph 1 of Count II, the defendant states it specifically denies each and every allegation therein contained, except the defendant admits that it is a corporation organized under the laws of the State of Iowa, with its principal place of business in Cedar Rapids, Iowa, and that the defendant is, and at all times mentioned in plaintiff's Petition was, engaged in the business of a common carrier by railway.

2. The defendant admits the allegations contained in paragraph 2 of Count II, except defendant specifically denies ~~that~~ the track upon which it delivered and set out the empty boxcars servicing Cargill, Inc. was a spur track.

3. By way of answer to paragraph 3 of Count II, defendant specifically denies each and every allegation therein contained, except defendant admits that on and prior to March 21, 1963, the plaintiff was employed by Cargill, Inc. at Cedar Rapids, Iowa.

[14] 4. By way of answer to paragraph 4 of Division II, defendant states it specifically denies each and every allegation therein contained, except defendant admits that subsequent to the delivery of the car mentioned in paragraph 2 of Count II some employee of Cargill uncoupled the two

northerly cars from said string of empty cars, if they were uncoupled.

5. Defendant specifically denies the allegations contained in paragraphs 5, 6, 7, 8, 9, 10 and 11 of Count II each separately.

WHEREFORE, the defendant prays that Count II of plaintiff's Amended and Substituted Petition at Law be dismissed at plaintiff's cost.

DIVISION III

By way of separate independent legal defense of both Count I and Count II of Plaintiff's Amended and Substituted Petition at Law, defendant states:

1. That all the empty boxcars which were delivered and set out on the spur track servicing the elevator of Cargill, Inc., as mentioned [15] in paragraph 2 of both Count I and Count II of plaintiff's Petition, were boxcars which were owned by railroads other than the defendant.

2. That when said cars were received by the defendant, but prior to the time of their delivery upon the spur track serving the elevator of Cargill, Inc., each of said cars was carefully inspected by the defendant to ascertain the existence of any defects therein; that none of said cars, at the time of their delivery by the defendant on the spur track, had any defects in the couplers thereon which it would have been possible for defendant to have discovered by means of a reasonably careful inspection and examination of such couplers.

3. That immediately prior to the time that such cars were delivered and set out on the spur track, mentioned in paragraph 2 of Count I and Count II of the Petition, all such cars were equipped with couplers which were capable of and did couple automatically by impact. That after said cars were so automatically coupled by impact, they were removed and transported to said spur track, where they were [16]

delivered and set out, and at the time of such delivery the cars so delivered still remained coupled together.

4. That after said cars were delivered and set out on such spur track, Cargill, Inc. did thereupon take exclusive possession and control of all such cars and continued to have such full and complete custody, control, and charge of such cars until subsequent to the time that the plaintiff claims to have received the injury referred to in his Amended and Substituted Petition at Law.

5. That the defendant did thereafter, subsequent to plaintiff's alleged injury, remove such cars from the spur track and at the time of the removal all couplers on all such cars were functioning properly.

6. That during the interval subsequent to the delivery of said cars upon the spur track, and until their subsequent removal therefrom by the defendant, it had no right or duty to manage or control said cars, nor did it in any manner manage or control any of such boxcars.

[17] 7. That no facts are alleged in either Count I or Count II of plaintiff's Petition which show the existence of any defect in the couplers on any of such cars or any other defect in such cars which would or did cause the couplers on any such car to fail to couple automatically upon impact; that no facts are alleged in plaintiff's Amended and Substituted Petition which show that any car failed to couple automatically upon impact when being used in the normal, natural, and usual manner; that it affirmatively appears from the allegations in plaintiff's Amended and Substituted Petition that at the time a car or cars is claimed to have failed to couple, such cars were being moved by the winch or cable, which was not the normal and usual manner of bringing railroad boxcars together for the purpose of causing them to couple. That it affirmatively appears by the allegations contained in plaintiff's Amended and Substituted Petition at

Law that Cargill, Inc., by and through its employees, had exclusive management and control of such cars, and of the winch and cables which were being used as an instrumentality to move such cars at the time it is alleged they [18] failed to couple.

8. That no facts are alleged in plaintiff's Amended and Substituted Petition which show that the defendant, in fact, did have, or in the exercise of reasonable and ordinary care should have had, knowledge which was superior to that of the plaintiff as to whether any railroad cars were, in fact, coupled or uncoupled at the time plaintiff alleges that he boarded one of said cars for the purpose of preparing to control the movement of the string of cars by applying the handbrakes on the car which he boarded; that no facts are alleged in plaintiff's Amended and Substituted Petition which support the naked conclusion alleged therein that the two most northerly cars were supposedly coupled to the third most northerly car at the time the plaintiff boarded the third most northerly car.

9. That no facts are alleged in plaintiff's Petition which show that the plaintiff could not in the exercise of reasonable and ordinary care have ascertained that the two most northerly cars were not, in fact, coupled to the third most [19] northerly car at the time he alleges he boarded the third most northerly car.

10. The defendant specifically denies that the couplers on any of such cars did, in fact, fail to couple automatically upon impact while such cars were on the spur track serving the elevator of Cargill, Inc. Defendant further states that no negligence existed on the part of the defendant in connection with the delivery of any such cars onto the spur track mentioned in paragraph 2 of plaintiff's Amended and Substituted Petition for the reason that defendant had no knowledge as to any defect in the couplers of any such cars so de-

livered, and for the further reason that the plaintiff does not allege the existence of any defect or condition in any such couplers of which the defendant, in the exercise of reasonable and ordinary care, should have had knowledge; that as a matter of law, a full and complete legal excuse exists for the violation by the defendant of any of the statutes referred to in either Count I or Count II of plaintiff's Petition.

WHEREFORE, defendant prays that [20] Count I and Count II of plaintiff's Amended and Substituted Petition, and each of said counts, be dismissed at plaintiff's cost.

(District Court of Linn County, Iowa.)

REPLY

(Filed in District Court November 5, 1965.)

Comes now the Plaintiff and for reply to the Answer of the Defendant, states:

I.

For reply to Division III of said Answer Plaintiff hereby denies the allegations of Paragraphs 1, 2, 3, 4, 5 and 6 thereof.

Wherefore Plaintiff demands judgment as in his Amended petition filed herein.

(District Court of Linn County, Iowa.)

**DEFENDANT'S AMENDED AND SUPPLEMENTAL
ANSWER**

(Filed in District Court January 13, 1967.)

DIVISION II

Comes now the defendant and [21] amends Division II of its Answer filed July 28, 1965, in the following respects:

1. The defendant amends paragraph 2 of said Division II by adding thereto the following:

"* * * except defendant specifically denies that the track upon which it delivered and set out the empty boxcars servicing Cargill, Inc. was a spur track."

2. The defendant specifically denies paragraph V of Count II of plaintiff's Petition, as amended by the Amendment thereto, pursuant to the ruling of the Court at the pre-trial conference on January 6, 1967, it being the intent of the defendant to specifically deny each and every allegation contained in said paragraph V of Count II as now last amended.

3. The defendant specifically denies paragraph VII of Count II of plaintiff's Petition, as last amended.

4. The defendant specifically denies the allegations contained in [22] paragraph XI of Count II of said Petition, as last amended.

WHEREFORE, defendant prays that Count II of plaintiff's Amended and Substituted Petition, as last amended, be dismissed at plaintiff's cost.

* * * * *

(Page 23, line 7 to page 23, line 30:)

[23]

DIVISION III

AMENDMENT TO DIVISION III OF PRIOR ANSWER

Comes now the defendant and, subsequent to the pretrial conference held on January 6, 1967, now amends Division III of its Answer filed on July 28, 1965, in the following respects:

1. By striking the word "spur" at each place where said word appears in paragraphs 1, 2, 3, 4, 5, 6, and 10 of said Division III of the prior Answer.

WHEREFORE, defendant prays that Count I and Count II of plaintiff's Amended and Substituted Petition, as last amended, and each of said counts, be dismissed at plaintiff's cost.

* * * * *

(Page 29, line 3, to page 33, line 1:)

[29]

DIVISION VII

SECOND SEPARATE DEFENSE TO COUNT II OF
PLAINTIFF'S AMENDED AND SUBSTITUTED PE-
TITION AS AMENDED IN ACCORDANCE WITH
THE PRETRIAL CONFERENCE HELD ON JANU-
ARY 6, 1967.

Comes now the defendant, Cedar Rapids and Iowa City Railway Company, and, under and pursuant to Rule 90, further supplements its Answer heretofore filed to make the same applicable to plaintiff's Petition, as now amended, the defendant now states that no facts are alleged in Count II of plaintiff's Petition, as now amended pursuant to the Amendment in accordance with the pretrial conference, sufficient to state a claim, in that:

1. No facts are alleged as distinguished from legal conclusions of the pleader which show a violation by the de-

fendant of Title 45, U. S. Code, Section 2. That no facts are alleged which show that at the time it is claimed the couplers failed to couple automatically by impact, or failed to stay coupled [30] until released, the cars were then located on the defendant's line.

* * * * *

3. That it affirmatively appears from plaintiff's Petition that said cars were not then being hauled or used by the defendant, but were then being used by the plaintiff as an employee of Cargill, Inc.

4. That no facts are alleged which show that the defendant gave its express permission that the cars could be recoupled after the two most northerly cars were uncoupled by a co-employee of the plaintiff, as alleged in paragraph IV of plaintiff's Petition.

5. That no facts are alleged which show that it was necessary to recouple said cars in order to subsequently move the third most northerly car by means of the winch at the time such subsequent movement became necessary for the purpose of putting the third most northerly car to its intended use.

6. That no facts are alleged from which the permission of the defendant to the subsequent recoupling of the cars could be reasonably implied.

[31] 7. That no facts are alleged which show that the defendant had any duty under Section 2 of Title 45 to furnish railroad cars which could couple automatically by impact when such cars were to be used and propelled by means of a winch.

8. That plaintiff's Petition, as now amended by the Amendment to paragraph VII of Count II thereof, fails to state that plaintiff's injuries were a direct and proximate result of a violation by the defendant of Section 2 of Title

45 of the U. S. Code. That paragraph VII of Count II, as now amended, presently alleges that as a result, in whole or in part, of the violation, plaintiff was permanently and severely injured. That such violation could not constitute an actionable wrong under the law of Iowa unless such violation was a direct and proximate cause of plaintiff's injury.

WHEREFORE, defendant prays that Count II of plaintiff's Amended and Substituted Petition, as last amended, be dismissed at plaintiff's cost.

(District Court of Linn County, Iowa.)

**PLAINTIFF'S REPLY TO DEFENDANT'S AMENDED
AND SUPPLEMENTAL ANSWER**

[32] (Filed in District Court January 20, 1967.)

Replying to the above-captioned answer, plaintiff states:

1. To paragraph 1, Division II of said answer, which amended paragraph 2 of Division II of defendant's Answer filed July 28, 1965, in point of law he alleges and asks the court to rule that whether the tracks herein involved were "spur" tracks within the meaning of the Iowa statutes is immaterial; that, as a matter of Federal law, which controls Count II, said tracks were a part of defendant's "line" within the meaning of the Safety Appliance Act.

2. To paragraph 1, Division II of said answer, which amended paragraphs 1 through 6, inclusive, and paragraph 10 of Division III of its answer filed July 28, 1965, as said allegations may apply to Count II, plaintiff realleges and incorporates herein paragraph 1 of this reply.

3. To paragraphs 1 through 6, inclusive, and paragraphs 8 and 9 of Division VI of said answer, plaintiff denies each and all of the [33] allegations contained therein.

(Page 34, line 30, to page 179, line 1:)

[34] 8. To Division VII of said answer plaintiff alleges that his motion to amend his petition at the pre-trial conference of January 6, 1967, and the Court's granting [35] of said motion, did not insert new matter into the pleadings, except for increasing the amount of damages prayed for, but, rather, had the effect of deleting from Count II of the petition the negligence allegations; that Rule 90 regarding supplemental allegation of facts which have happened subsequent to the commencement of the action, or facts which have come to defendant's knowledge since its prior pleading, does not apply.

9. To Division VII of said answer, plaintiff denies each and all allegations contained therein.

10. To Division VII of said answer, plaintiff states that the alleged lack of facts sufficient to state a claim has been brought on for hearing by defendant and ruled upon, by the Court, adversely to defendant on June 14, 1965. For further reply to Division VII of said answer, plaintiff incorporates by reference and realleges herein paragraph 4 of this reply.

11. To paragraph 8 of Division VII of said answer, plaintiff states that, as a matter of Federal law, which controls Count II, defendant [36] is liable for injuries resulting in whole or in part from its violation of Section 2 of Title 45 of the United States Code; that, as a matter of law, his pleading is sufficient.

WHEREFORE, plaintiff prays for judgment as demanded in his Petition.

(District Court of Linn County, Iowa.)

**LETTER OF TRIAL COURT REQUESTING PRETRIAL
CONFERENCE AND QUESTIONS TO BE DIS-
CUSSED.**

THOMAS H. NELSON

Judge, Nineteenth Judicial District

Court House

Dubuque, Iowa 52001

December 30, 1966

John B. Halloran

Attorney at Law

511 Minnesota Federal Bldg.

Minneapolis, Minnesota 55402

Mr. William Dallas

Lynch, Dallas, Smith & Harman

[37] Attorneys at Law

526 Second Avenue Southeast

Cedar Rapids, Iowa

**Re: Crane vs. Cedar Rapids & Iowa
City Railway Company**

Gentlemen:

This is to confirm the setting of a pretrial conference in the above-entitled matter in my chambers in the courthouse in Dubuque on Friday, January 6, 1966 at 2:00 p.m. Since Mr. Halloran has indicated that he will not be present personally and is sending one of his associates, I believe I should outline some of the questions which I would like to discuss at the time of the pretrial conference. I do not propose that these questions are exclusive nor that they will all be answered at the pretrial conference but I believe it would be in the interest of all parties if the persons attending the pretrial conference were in a position to discuss these matters

intelligently and commit their respective clients on most of them.

(Note: Questions 1 through 20 and 22 through 24 omitted.)

[38] 21. What is the status of contributory negligence under Count II?

/s/ T. H. Nelson, Judge

(District Court of Linn County, Iowa.)

**PLAINTIFF'S PRE-TRIAL CONFERENCE
MEMORANDUM**

(Filed with Court January 6, 1967.)

The Honorable Thomas H. Nelson, Judge of the Nineteenth Judicial District in the State of Iowa has been assigned for the trial of the above case and has set up a pre-trial conference to be held before him in his chambers at the Court House in Dubuque, Iowa on Friday, January 6, 1967, at 2:00 p.m.

In a letter dated December 30, 1966, Judge Nelson posed certain questions to counsel for the parties which he would like to have considered at the pre-trial conference and counsel for plaintiff submits his consideration of these questions, in addition to other matters normally considered at the pre-trial conference.

* * * * *

[39] The plaintiff's position relative to the questions posed by Judge Nelson in his letter of December 30, 1966, are as follows:

* * * * *

Question No. 21. It is the plaintiff's position that contributory negligence does not apply under Count II of plaintiff's Petition as violation of the Federal Coupler Statute creates absolute liability. Plaintiff's allegation in paragraph VIII, Count II, is unnecessary and surplusage.

* * * * *

(District Court of Linn County, Iowa.)

ORDER ON PRE-TRIAL CONFERENCE

(Filed in District Court January 10, 1967.)

Pre-trial conference was held in the above-entitled cause on January 6, 1967. Both parties were represented by counsel.

* * * * *

14. The parties agree that at the time of the accident defendant was engaged in interstate commerce [40] and that the tracks up to the point of delivery of the cars to the spur in question were highway of interstate commerce but defendant does not admit that the cars or the spur track involved were in interstate commerce.

15. Defendant states that it does not own the spur track referred to in the Petition.

16. The Court advised the parties that he is of the opinion that it is illegal to lay a private siding in a city street and that the only party who may own a track in a city street is a public utility and that consequently if it appears at the trial that the track in question lay in a city street it would seem that he should indulge a presumption the same is there legally and is owned by defendant. Counsel for defendant advised the Court that he would investigate this question.

17. Defendant advised the Court that defendant did not intend to admit that the track in question was a spur track within the meaning of Section 481.3.

* * * * *

[41] 19. Plaintiff filed a motion for leave to amend Paragraph V, Count II, Paragraph VI, Count II, Paragraph VII, Count II, Paragraph XI, Count I, Paragraph XI, Count II, and Paragraph XIII, Count III of the Petition and it is hereby ORDERED that said Motion is granted and the Petition stands so amended and defendant is granted until January 13th, 1967 to move or plead thereto. Plaintiff shall have three days after said date in which to reply to any affirmative matter in responsive pleading of defendant to said amendments.

20. It was agreed by all parties that in Count III of the Petition the burden is on plaintiff to plead and prove freedom from contributory negligence. Plaintiff advised the Court that it is plaintiff's position that contributory negligence is an affirmative defense to Count I and no defense to Count II. Defendant does not agree with plaintiff's position with regard to Counts I and II.

* * * * *

Done and Ordered this 10th day of January, 1967.

[42]

/s/ T. H. Nelson, judge

(District Court of Linn County, Iowa.)

FINAL ORDER

(Filed in District Court January 23, 1967.)

Under the authority granted in R.C.P. 105, the Court in the exercise of its discretion, after issues joined and before trial and after hearing arguments on the following points of law raised in the pleadings and going to material parts of the case, has determined to enter a final order before trial adjudicating the following points of law which shall not be questioned on the trial of any part of this case.

IT IS THEREFORE ORDERED AND DECREED that the law of this case shall be as follows:

1. That a violation of the Safety Appliance Act (45 USCA 2) is negligence as a matter of law, but that, in cases brought in this court not based on the Federal Employers' Liability Act, the following rules apply:

- a. The liability is not [43] absolute;
- b. All common law defenses except the defense of assumption of risk apply;
- c. The burden is on plaintiff to show his freedom from contributory negligence;
- d. The violation must be a proximate cause of plaintiff's damage.

2. That the Safety Appliance Act requires that the cars to which it applies be equipped with couplers which will couple automatically by impact when set in an "open" position and will thereafter remain coupled until set free by some purposeful act of control and that the impact referred to is an impact of force equal to or greater than the impact normally employed by the railroad in coupling cars.

3. That the employee of a consignee properly engaged in unloading cars on a siding under control of the railroad

is within the class of persons protected by the Safety Appliance Act.

[44] 4. That, if the railway siding or spur involved in this case is laid on public property or is not on the Cargill property, it is part of the main line of defendant railway.

5. That the use by an abutter of the public street abutting his property for loading and unloading is not a nuisance so long as it does not harm the property of others or unreasonably interfere with the use of the street by the public.

/s/ T. H. Nelson, Judge

(District Court of Linn County, Iowa.)

**NARRATIVE SUMMARY OF EVIDENCE AND
TRIAL PROCEEDINGS**

RONALD CRANE,
plaintiff, being sworn, testified as follows:

DIRECT EXAMINATION

My name is Ronald Lee Crane and I live in Cedar Rapids Iowa. I was born November 27, 1940, and am now married and have three children. I completed the ninth grade and prior to entering military service [45] in January of 1958 I worked as a bricklayer-helper and a car hop. I was discharged from the Marines in January of 1962. I worked for a filling station for several months and from March until September of 1962 I worked as a siding applicator, putting aluminum siding on home exteriors. This work required working on scaffolding and use of ladders, and during this period I learned the work sufficiently to be able to do it on my own. In September of 1962 I was employed by Cargill, Inc., as a meal house helper. I left Crane Home

Improvement Company because it was the end of the siding season. I worked as a meal house helper for Cargill until March 21, 1963, when an accident occurred to me while I was working for Cargill. From September of 1962 until the accident date-I worked with Mr. Harris, who was the meal house operator. My job was to assist him in the loading of bulk trucks and bulk boxcars, sack trucks and cars. My duties included assisting in the moving of railroad cars and spotting them for loading and unloading them, and assisting in the weighing of cars which were to be loaded. The boxcars were loaded on the meal [46] house track which track was located alongside the Cargill plant.

(Plaintiff's Exhibits 1 through 11 offered and received in evidence.)

The railroad tracks beside Cargill run generally north and south. Exhibit 1 shows the meal house track, which goes through the meal house loading dock north, to the elevator where a scale is located, where Mr. Harris and I weighed boxcars preliminary to loading them. Exhibit 3 shows the same tracks and buildings, and shows the winch and cable used for moving and spotting the boxcars. Exhibit 4 is a picture of the meal house loading dock. Exhibit 5 depicts some boxcars on the bean track, which is adjacent and to the east of the meal house track. The bean track is used to spot cars destined for the elevator, and said track is connected to the meal house track by a switch up north towards the elevator. To the east of the bean track are through tracks on which the Cedar Rapids and Iowa City Railway carry cars to various industries. My X marked on Exhibit 6 identifies the approximate area where the bean track [47] switch is located. The bean cars are unloaded in the elevator itself. Exhibit 8 depicts a boxcar at the meal house and also shows the Nutrena track, a stub track which ends at the meal house loading dock. The meal house track

connects with other tracks north of the elevator. Exhibits 1 through 8 are all photographs taken looking toward the north. Exhibit 9 shows the meal house track taken from the north, looking south. It shows a boxcar sitting under the canopy in the meal house and also shows the winch, which is on the east side of the meal house track. Exhibit 10 is similar to No. 9, but was taken from farther north. Exhibit 11 was taken from the east, looking west, and I have placed an X on the building known as the meal house.

CROSS EXAMINATION

It is approximately six to eight boxcar lengths from 12th Avenue to the meal house loading dock, each car being approximately 40 feet long. From the meal house loading dock to the elevator shed is approximately 250 feet.

Q. In other words I call your [48] attention, Mr. Crane, to this legend. When I say legend, I mean the type-written material that is on Plaintiff's Exhibit 6. You see what I am talking about? A. Yes, I see what you are talking about.

Q. And that is on a photograph, and it speaks about this curve, track curves sharply to the left. Now that is the curve that appears in that photograph as you look down towards the north, towards what is the elevator, is that correct?

A. Yes, it is.

Q. Now have you been out there lately, and is that the same situation as exists today as was then?

Mr. Halloran: That is immaterial.

The Court: Overruled.

A. It looks the same.

The curvature of the tracks shown [49] on Exhibit 6 has not, to my knowledge, been changed.

DIRECT EXAMINATION

(Plaintiff's Exhibit 13 offered and received in evidence.)

Exhibit 13 shows the meal house track, meal house and meal house loading dock on the left or south side, and the elevator on the right side. I mark Exhibit 13 with an X-2 indicating the meal house and X-3 indicating the elevator.

It was Mr. Harris' job to operate the winch and hook the winch cable to the cars for the purpose of moving them for spotting and weighing. As a meal house helper I assisted him by applying the brakes and stopping the cars.

Between 3:00 and 3:30 a.m. on March 21, 1963, an accident occurred to me while working for Cargill.

Q. Will you tell us what happened? A. Well, in the process of taking—doing my duties at Cargill we had two runaway boxcars.

[50] Mr. Dallas: Wait just a minute, I move to strike out, it was a mere voluntary statement of the witness, statement of conclusion, not the statement of any fact.

The Court: Overruled.

A. (Continuing) We had two runaway boxcars and there were people down below working to the best of my knowledge.

Mr. Dallas: That is objected to as mere conjecture and surmise and not a recitation of any facts at all.

The Court: Overruled.

A. (Continuing) So as soon as I saw these boxcars were moving too fast to my estimation I proceeded to get down off the car which I was on, which was the third car in the string, I got down and then I ran after these two cars and the thought in my mind was to get these cars stopped before they had any chance to get down to the other cars sitting down on the scale where to the best of my knowledge there were people [51] in this car, and I did my best to get these cars stopped before they could get down there, and

while doing this I fell and lit between the tracks and smashed both of my heels.

I had started working that particular shift at 11:00 p.m. on March 20, 1963. At about 1:00 a.m. the morning of the accident Harris and I were to load some boxcars. The cars to be loaded were in a string of approximately six cars, which string was located somewhat south of the meal house, towards 12th Avenue. Before loading these boxcars we had to weigh the two most northerly boxcars. The cars are weighed at the elevator scale. To commence the weighing movement Harris hooked the electric winch cable to the south end of the second car. I got up on the brake platform of the third car for the purpose of applying the brake, at Harris' given signal, so the rest of the string would stay where it was supposed to. Harris started the winch and pulled the whole string down to a given point where he uncoupled the lead two cars from the third car in the string, and signaled me to put the [52] brake on the third car to stop them at the point where he signaled. This was done so that when we brought the two cars back from being weighed the first car would be in position to load, or we would have to pull back toward 12th Avenue just a little further. This would prevent us from having to make another hookup. Harris took the first two cars down to be weighed, and I stayed in the meal house area. The two most northerly cars were weighed and brought back toward the meal house with the winch. When they were brought back I was standing somewhere in the vicinity of the winch. I saw the cars come back with a sufficient force to push the string of cars back toward 12th Avenue a few feet, and the brake was still on the third car when this was done. When the two cars which were weighed were brought back they made contact with the third car of the original string, which third car was coupled to the other three cars of the string which were not

weighed. Neither I nor anyone else released the brake that I had set on the third car from the north prior to the weighing movement.

[53] After this impact the first car to the north was either in a position to be loaded or we pulled it back toward 12th Avenue until it was in a position to be loaded.

We then proceeded to load that first car, which took approximately two hours.

We then prepared to spot the second car for loading. I got up on the third car of the string to work the brake and Harris was on the ground. He hooked the cable to the second car in the string. It was then that the two cars broke away from the string and proceeded to go toward the elevator. My purpose of getting on the third car from the north was to control the movement of the cars. I first released the brake and when we got in position where we would spot the second car, on a given signal I was to put the brake back on to stop the car. Harris operated the winch. Prior to this movement I was on the east or winch side of the cars and before getting up on the north end of the third car I observed the condition of the coupler or the knuckles. The knuckles of the coupler were together and [54] appeared to be closed.

Previously, at the beginning of the weighing movement, the two cars to be weighed were released from the remainder of the string by Harris, who released the two cars with the pin lift lever on the north end of the third car, on the winch side. That is the same place where the ladder was located that I climbed to get up on the north end of the third most northerly car. During the weighing movement I saw Harris operate the pin lift lever, and observed the condition of the knuckle on the third car when Harris pulled the pin. The coupling opened as the two cars broke away from each other.

During the second operation, when we were attempting to

spot the second car for loading, Harris connected the cable to the second car, and when the winch was operated, the first two cars took off quite rapidly from the string that was standing.

At that time or prior to that I had observed a car in the elevator scale area. Cargill conducts unloading operations at the scale. [55] Cars are brought in, loaded on the bean track, and brought into the meal house track at the elevator for unloading. When these two cars broke away I observed a car in the elevator area. Whenever there is a car on the scale it is presumed that somebody is inside working. I assumed there were people inside unloading this car.

When the two cars broke away, I observed Harris start running toward the far end of the cars. At this time there was a grade in the track, which goes down from the meal house to the elevator. My immediate reaction was to get these cars stopped before they could get to the elevator because of people possibly down in this car working. Before attempting to go after those cars I reset the brake on the third car, which I had previously released. I did this to make sure these cars didn't move down the grade, too. I went down the ladder of the third car and ran to catch up with the other cars. They had traveled approximately a car length to a car length and a half. I caught up with the second car, got up on the brake platform, and believe I started to operate the brake to [56] stop the cars. While operating the brake I fell from the south end of the second car onto the cement apron, between the tracks, and a little bit to the 12th Avenue side of the winch. The brake platform was between 12 and 14 feet from the ground.

I remained conscious. I found I couldn't stand up. I took my shoes off and saw that the bones were pushed up towards my heels, and swelling had started. I had landed directly on my heels, which pushed my bones straight up into my feet.

It was very painful. Mr. Wienands took me to Mercy Hospital. I was given a hypo for the pain and they put my feet into casts. Dr. Bomkamp, my family doctor, and Dr. Bickel, a bone specialist, attended me. I remained in the hospital on this first occasion between nine and ten days. My heels were very painful. They gave me a hypo every four hours. After the first six or seven days I was able to get into a wheelchair. When I left the hospital I still couldn't walk as both feet were in casts.

During the weighing movement, when Harris pulled the pin lever, [57] I was on the third car, and at that time I saw the knuckle open. When Harris took the two cars down to be weighed I stayed in the general meal house area near the winch. I remained in the same area and there was nobody in that area besides myself.

I wore the first casts for approximately four to five weeks. These were removed and I wore another set of casts approximately four to five weeks. During this period I took medication for pain. Under doctor's orders I was not able to place any weight upon my feet. After the second set of casts were removed I stayed off my feet for ten days and then got a pair of crutches. My left foot wasn't healing properly, so I was again hospitalized at Mercy Hospital (on November 14, 1963), when I had a bone fusion. They took a bone out of my left hip and put it into my left heel, fusing some kind of a joint. I was hospitalized approximately seven or eight days. Because of pain, I had to stay off the side from which they took the bone out of my hip. After this operation I had a walking cast for four or five weeks. Following the [58] accident I was not able to do any kind of work until approximately September of 1963, when I did some errands for my father. In the early part of 1964 I attempted to return to work at Cargill. I worked for two days and found out I no longer had the capacity to do that type of work. In the early

part of 1964 I took four weeks training through the Vocational Rehabilitation Center in Cedar Rapids for arc welding. Prior to this I attempted to work for my father on siding application jobs. I found I was extremely limited in my capacity to do the work of a siding applicator. I no longer could work well on ladders and scaffolding. This accident diminished my center of balance, which you must have when working in the air. Since July 17, 1964, I have worked regularly for Universal Engineering as a welder. Excessive standing on this job causes my feet to get extremely tired and sore, and sometimes welding from a ladder is difficult. When I went to work for Cargill, I planned to go back to siding the following summer.

Prior to the accident of March 21, 1963, I was in excellent health, [59] and never had any trouble with my feet. Presently, my right foot is continuously painful, but more so when exercised. I cannot run at all. Motion of the right foot is limited to some degree. Presently my complaints with the left foot are the same as the right, except where they did the bone fusion I have lost the inward and outward movement of my foot to a great extent. Since the accident, my left foot has never been completely without pain. The injuries to my feet have affected my center of balance greatly. I have a constant dull pain in my left hip where they took the bone out, which sometimes shoots pain into my back. This limits my lifting and movement capacity.

In 1962 I earned \$4,109.29, from the following sources: \$86.80 from the Marine Corps, \$448.02 from Martin Oil Company, \$262.85 from Aluminum Window Company, \$1,815.10 from Crane Home Improvement Company, and \$1,496.52 from Cargill, Inc.

In 1963 I earned \$1,977.38, from the following sources: \$1,506.38 from Cargill, Inc., \$61.00 from Shell Oil Company, and \$510.00 from [60] Crane Home Improvement Com-

pany. The 1963 earnings from Cargill, Inc. were earned between January and March 21, 1963.

In 1964 I earned \$3,980.88, from the following sources: \$2,981.34 from Universal Engineering Company, \$36.64 from Cargill, Inc., and \$962.90 from Crane Home Improvement Company, \$110.00 of which was earned after I commenced working for Universal.

In 1965 I earned \$6,979.64, \$6,729.64 of which I earned from Universal and \$250.00 from Crane Home Improvement Company.

In 1966 I earned \$7,821.89, of which \$7,284.64 was earned from Universal and \$537.25 from Crane Home Improvement Company.

CROSS EXAMINATION

While working for Cargill, Inc. in 1963 I earned \$2.62 per hour. During the last year I haven't had to lay off work because of foot trouble.

I have had a steady and constant improvement in the condition of my [61] feet from the day I left the hospital until the present time.

The string of approximately six cars involved were there when I came to work.

There was another shift which was doing the same job of moving and filling the cars before I came to work. What those men may have done with respect to weighing those cars I would have no way of knowing. And I did not know how those two cars which I say were in front of the cars further south got coupled into the string. I would not know whether Cargill people coupled them or whether they were coupled in switching. It became desirable to take those two cars down to weigh them at the scale and I got up on what I have described as the third car. Mr. Harris applied the winch by attaching the cable to the second car from the north. When

he did this he moved the whole string of cars. This car on which I was standing was moved some distance as a result of that operation. At that time the third car and the second car were then firmly coupled together. While these cars were moving Mr. Harris came up and [62] lifted up on the pin lifter which was at the northeast corner of the third car. When he lifted up on that pin lifter the couplers opened enough to permit the two cars to separate, and I know at that time those cars were equipped with couplers that were functioning in the usual and ordinary way that couplers were supposed to operate. It was coupled together and I know they could be uncoupled without the necessity of anybody going between the cars to uncouple them. At that time I was standing on a platform at the north end of what I described as the third car.

The photograph, Defendant's Exhibit 14, correctly and accurately represents the conditions as they existed at the time of the accident, except that I do not know whether this marquee, or building or roof, then existed, or whether those lights that appear in that photograph were then there. When the winch was applied and those first two cars were pulled some signal was given and I applied the brakes on the third car. The speed at which the cars were traveling was such that when I applied the winch they stopped almost instantly. I [63] would not be able to identify the location at which the car stopped with reference to the shed because I don't remember whether the shed was there or not.

At the time I applied the brake on the third car, and when it came to a stop, it was south of where the loading dock was. It wasn't set in a position to load up. We were not trying to spot it. After the other two cars were brought back from being weighed, they came in contact with this string of cars that was setting there, and they moved this string of cars

back a few feet. I believe that I estimated before that these cars were moved back perhaps about five feet.

At the time these cars came in contact there, and moved this five feet, the most northerly car was then spotted in a position to be loaded out in front of the loading dock, and the second car would then have been further on south.

(Defendant's Exhibits 14 and 15 offered for illustrative purposes, and admitted into evidence.)

Looking at Exhibit No. 13, [64] nothing in the physical layout of the Cargill plant appears to be changed. The conditions, train, buildings, everything out there as far as I am aware were the same today, or two days ago when I looked at it, as it was on the 21st day of March. I am not qualified to say whether it is exactly the same. It appears that it is but I won't say that it is. If there were any changes I was not able to detect it from the inspection I made. The purpose of pulling the entire string northward during the weighing movement was to prevent another movement later on. By spotting the third car in the position we did, we wouldn't have to carry the hook back so far when it came time to get it stopped for loading, and it prevented us from having to hook on to spot the first car. At the time of the weighing movement, we could have uncoupled Cars 1 and 2, weighed them, brought them back for loading, and then taken them down for reweighing, without recoupling onto the string of cars, but this would have necessitated another move.

If we had not pulled car number three, and the remaining cars in the [65] string, at the time I applied the brake, and the other two cars were uncoupled, it would have been necessary to carry this hook back to where Car No. 3 was for the purpose of moving it up after Cars Nos. 1 and 2 were brought back and loaded, and they were ready to be moved away for weighing.

(Defendant's Exhibits 16 and 17 identified.)

Exhibit 16 shows the end of a railroad car, the brake wheel, the brake platform and ladders. It also shows a coupler, but I don't know whether that is an overhead or an underslung coupler. I never knew the difference between the overslung and underslung coupler. Exhibit 17 shows the pin lifter on a coupler.

Q. Well, let's take a look here at the photograph, Defendant's Exhibit 17, and I ask you if that doesn't show a better view of a coupler, and if that isn't an overhead coupler showing the pin lifter, that is the lever here that you say Mr. Harris took hold of and he uncoupled [66] the car, isn't that true? Not on this one, but that is the kind of a lever it is? A. Yes.

Q. That's right. And that is what we call the pin lifter, isn't that true? A. Yes, sir.

Q. And when Mr. Harris went out and took ahold of this he lifted up the pin and that uncouples the car and permits the two cars to separate, isn't that true? A. Yes, sir.

Q. And you say you saw him do that? A. I saw him lift the pin lifter.

Q. That's right, that's right, and saw it worked all right?

A. Yes, s'r.

Q. That's right. Now, that is what we call an overhead coupler, you see that, don't you? [67] A. Yes, sir.

(Defendant's Exhibit 18 identified.) I guess that is what is called an underslung coupler.

Q. Well, in other words, in your work out there you have noticed that there are two different kinds of couplers, one the lever goes underneath the coupler and that is what we generally refer to as an underslung, and one that goes over the top as an overhead pin, is that correct? A. I knew there were two types.

Q. That's right, that's right. And you knew that unless the pin was down that the cars were not securely coupled together, you knew that, didn't you? A. I don't know much about couplers myself.

Mr. Dallas: Will you please answer my question, sir? Read him the question.

(The pending question was read by the reporter.)

[68] A. Well, the couplings appeared to couple.

Q. Now, please, please, can you answer that question yes or no? A. No, I don't know if it would be an underslung or overhead.

Mr. Dallas: Did you understand my question? Read the question.

.

(The pending question was read by the reporter.)

A. I believe so.

.

Q. Mr. Crane, I call your attention here to page 132 of your discovery deposition, particularly to the question that, starting at line 6 thereof, which reads, "Question. And you couldn't tell personally whether the pin had dropped or whether it hadn't, could not?" That is the question, is that right? A. Yes, that's correct.

[69] Q. And your answer, "No, I couldn't tell whether it dropped." A. No.

Q. That's right. Well, no, you mean that is your answer, isn't that correct? A. That is true, my answer is no.

I cannot say where a single light was located in that area at that time, and at the time of the accident I did not have a flashlight or lantern with me.

During the accident movement, when the two cars began to move away, I set the brake on the third car, climbed down the ladder, overtook the southernmost of the two moving

cars, got up on the brake platform, was engaged in turning the brake wheel on that car when for some unknown reason I lost my balance.

Q. That's right. And you told us before for some unknown reason you lost your balance, isn't that true?

A. Yes, sir, I don't know the [70] reason why.

Q. That's right. And you told us before there was nothing gave way on that car that caused you to fall? A. No, sir.

Q. Now, you told us before, I think, I have got a picture here—maybe we can take a look at what has been marked Plaintiff's Exhibit 3 and kind of get our bearings straight on that. I believe you told us before, and let's get out what you told us before, you have—cannot give us within a degree of accuracy the exact position that you fell in except some place south of this winch which is shown in Exhibit 3. You would not be able to give us anything in feet, or anything like that, as to how far south you were, could you?

A. No, sir, I couldn't.

Q. That's right. And if someone were to say that they observed you at a point probably a half a car length south of the winch, [71] that would not be anything that you would disagree with, is it? A. I guess not.

The two runaway cars were moving at a pretty good speed, but I can't estimate in miles per hour.

Q. But you had gotten down off after you had taken the time to set the brake, you had then been able to get down off of that stationary truck and been able to move over, overtake this last of the moving cars, crawl up the ladder of that moving car and gotten up there and were manipulating the brake when you fell off at a position some distance south of the winch, isn't that true? A. Yes, sir.

Q. Now, these railroad cars are forty feet in length, aren't they, generally? A. Yes, sir.

Q. So that that would mean that your Car No. 1 was spotted in front of the loading dock for [72] loading, that there would be approximately twenty feet of that car that would extend to the south of the loading dock, is that true? Approximately? A. Yes.

Q. And then you had the second car which would be forty feet? A. Yes.

Q. So that you had a situation where it would be sixty feet from the winch over to where you were stationed on this, oh, third car which was not coupled to the other two, is that true? By that calculation? A. Approximately.

There is also a winch located at the elevator. When cars from the meal house stop before they get to the elevator shed this winch is used to pull them to the scale, but it is mainly used for the bean cars on the bean track. Because of the decline in the track from the meal [73] house towards the elevator, the cars move by gravity towards the elevator. If they stop short of the elevator scale the elevator winch is used. Between the meal house and the elevator the grade of the meal house track is like a saucer.

I cannot name the person unloading beans that morning.

At the time I fell off this railroad car the sole objective prior to the time that these cars became separated was to move Car No. 1, which was then loaded, away from the loading dock so that Car No 2, which was unloaded, would be in a position where it would be stopped in front of the loading dock for loading.

REDIRECT EXAMINATION

It was the custom and practice to do as we did on the night of the accident during the weighing movement, to pull the whole string down so the first car would be in a position for loading after it was weighed. On the morning of the accident there was sufficient light for me to see what I was doing.

[74] Q. Mr. Dallas has read from your deposition, you referred to page 132, line 6, and I will reread the question and the answer. I want to refer to something else in this deposition. The question he read to you as having been posed to you at the time of your deposition, starting with line 6, was, "And you couldn't tell personally whether the pin had dropped or whether it hadn't, could you?" That question was posed to you, wasn't it? A. Yes, sir.

Q. And I'll read the answer, line 8. "No, I couldn't tell whether it dropped." * * *

If there had been a pin on top of this coupler there was enough light to have enabled me to have seen it. There was sufficient lighting for me to see what we were doing.

Q. And the following question: "Question. I am not asking you that. I am asking if there was enough light for you to have seen a pin if you looked [75] for a pin, whether it was up or down." That was the question. And the answer was, "Answer. The coupling appeared to be coupled." Is that the question that was asked of you and the answer given by you at that time? A. Yes, sir, it is.

Mr. Dallas: Mr. Halloran, will you please keep reading?

The Court: No, if you wish to put something in you are afforded the opportunity.

Mr. Halloran: Yes, I will continue. Mr. Dallas made the suggestion.

Q. Continuing, line 134—or page 134, line 23. “Question. Will you please answer the question as to whether you could have seen the pin or not if you had looked?” “Answer. I looked at the coupling. It looked like it was locked.” Was that question asked of you and that answer given?

A. Yes, sir.

[76] Mr. Dallas: Do you want to read the next question and answer?

Q. And was that true? A. Yes, sir.

Q. And the next question. “Question. Did it look like the pin had fallen?” “Answer. I don’t know.” “Question. Did you see a pin?” “Answer. I don’t recall seeing a pin. I don’t know if I saw one or not.” Were those questions asked of you and those answers given? A. Yes, sir, they were.

Q. Now, Mr. Crane, I will ask you that if prior to the accident which occurred to you on March 21st, 1963, you had noticed or heard of an underslung coupling or an overhead coupling?

Mr. Dallas: Objected to as irrelevant and immaterial.

The Court: Overruled, you may answer.

[75] A. Yes, sir.

Q. And I will ask you if you knew the mechanism of the coupling? A. No, sir.

Q. And when you refer to the pin and the pin dropping, and blocking, had you ever gone into, or heard, or been instructed by anyone with reference to the operation of a coupling?

Mr. Dallas: Objected to as excessively leading.

Mr. Halloran: Proper redirect examination.

The Court: If you will indulge the reporter and speak one at a time, Gentlemen, he can do better. The objection will be overruled.

Mr. Halloran: Will the reporter read the question back, please?

(The pending question was read by the reporter.)

[78] A. No, sir.

(Defendant's Exhibits 16, 17 and 18 admitted.)

At the time of this accident I knew what knuckles of a coupler were. When the pin lift lever is operated on the side of the car it opens the knuckle. When the cars come together and the knuckle is closed it is my understanding that the couplings are closed and locked. On the morning of the accident when I boarded the north end of the third car for the purpose of releasing the brake so Harris could spot the second car, I observed the condition of the knuckle on the north end of the third car. The knuckles were closed and appeared to be locked.

Q. Mr. Crane, Mr. Dallas went at great length to bring out the fact that there was an incline from the meal house, X No. 2 running north, incline in the track, and there was some sort of an incline running from the elevator to the south, and that there was a saucer or a low spot somewhere in the middle area, is that correct? [79] A. Yes, sir.

Q. And you subscribe to that? A. Yes, sir.

Q. At the time of your accident this was the condition of the track? A. There was a saucer, yes, sir.

Q. Yes. Now, I will ask you, Mr. Crane, that if prior to the occurrence of your accident on March 21st, 1963, you had ever seen cars being cut off or pulled from the meal house track where they did not stop in the saucer but proceeded down all the way to the elevator? Have you seen that?

A. No, sir.

Q. You had not seen that? A. No, sir.

Q. Had you heard of them doing that? A. Yes, sir.

[80] Mr. Dallas: Objected to as calling for hearsay and immaterial.

The Court: Sustained.

I didn't work in the area of the elevator and I knew the individuals who worked there only by face.

CROSS EXAMINATION (Continued)

(Defendant's Exhibit 19 identified.)

Q. Now, I call your attention, Mr. Crane—I will get back here where the jury can get some idea what we—to a photograph which has now been identified as Defendant's Exhibit 19 and it was—has also written on the back of it Defendant's Exhibit 3 and that is November 1st, '66. That is a photograph you saw at the time of your deposition. Do you remember this picture? A. I believe so.

Q. Now, you see some boxcars that are sitting on what we refer [81] to there as the meal house track, is that correct? A. Yes, sir.

Q. And there is a boxcar that has a C and NW on the outside of it and it would be just south of the car that is sitting at the loading dock, is that correct? A. It would be approximately correct.

Q. That's right. And the car at the loading dock is the car that would have the open door, is that correct? A. Yes.

Q. And that winch appears in this photograph, Exhibit 19, is that correct? A. Yes, it does.

Q. In that position there. Now, as I understand, at the time you undertook to get up on the third car for the purpose of setting the brake, you would have gotten on the car here that has this [82] end of it, and has the E on the end of it, is that correct? A. That would be the fourth car.

Q. That is the first car in front, this is the empty car in front of the loading dock, isn't it? The one with the open door? A. That means you are excluding that.

Q. I am not counting that at all. A. All right.

Q. That is an extra car. Let's don't get it in the picture.

So you at the time you got up on the car for the purpose of setting the brake, your purpose was to spot the car which would be in the position of this car which has the C and NW on the side of it, is that correct? A. Approximately, yes.

Q. And can you tell the jury where the winch was attached to this C and NW car? [83] A. It was attached to the second car. There is different places on different cars.

Q. Could we have a pen or something we can write on a picture here—we can kind of indicate so the Jury will—will you please take this pen here and mark on this Exhibit 19 some place where you say, to the best of your judgment, approximately the hook was attached to the cable that extended from the winch?

Mr. Halloran: If you know.

Mr. Dallas: If you know, that's right.

A. On this particular car here it would be approximately here. That is not saying that is the place I would put it on every car.

Q. You made an X at a point right above the wheels which would be the south set of wheels on the C and NW car. Now you have indicated that as a place where the hook would ordinarily be attached, is that correct? [84] A. To this car.

Plaintiff's Exhibit 8 shows a picture of the meal house track, a car situated in front of the loading dock, and the second car to the south of that is situated on a curve in the meal house track.

Q. Then the second car to the south of that car in front of the loading dock would be situated on that curve that appears in the meal house track south of where that car is spotted in front of the loading dock, is that correct?

A. I believe so.

Q. And that same curve appears in the photograph which has been identified as Plaintiff's Exhibit 2, is that correct?

A. Yes.

With the winch and cable attached to the boxcar on the curve, the winch is pulling on an angle. I don't know what the drawbar of the boxcar is. I don't know whether the drawbar must have lateral play [85] to permit the car to round the curves.

I have seen a locomotive spot boxcars from 12th Avenue right into the loading dock, but I have never seen a locomotive between the loading dock and the elevator. All movements in that area were done by the winch. To the south the meal house track goes back into other tracks, and to the north of the scale the boxcars go all over the country.

To the best of my knowledge all of the boxcars involved on the morning of the accident were 40-foot cars.

Q. Now, I call your attention to a written interrogatory which you were requested to answer here and I will ask you to follow me as I read it over here to you. Interrogatory No. 3. It was among the interrogatories which were requested that you answer and it was filed on November 15th, 1966.

* * * * *

Q. I am going to ask you if you did [86] not have put to you—

Mr. Alfveby: Same objection, Your Honor.

The Court: Overruled.

Q. (Continuing) Interrogatory No. 3 which reads as follows: Please state the specific defect or defects which you claim existed in the coupler on the car referred to in paragraph 5 of your petition which you claim caused the pin on said coupler to fail to drop upon impact as alleged in paragraph V, Count 1, and paragraph V of Count 2, where the same paragraph is incorporated by reference. Do you remember that interrogatory?

Mr. Alfveby: Your Honor, I would object to this question on the grounds that under the law a specific defect is immaterial: the question is whether it fails to function at the time.

Mr. Leff: Improper cross examination also.

The Court: Overruled.

[87] Q. And your answer, I don't know, is that correct?

A. It appears to be.

Q. And that answer, I don't know, is sworn to by you on the 19th of November, 1966, isn't that true? A. Yes.

Q. And if that same answer was given today it would still be, I don't know, is that correct?

The Court: You mean if the question were asked today?

Mr. Dallas: That's right.

Q. If the question were asked you and you were asked to answer it, what would your answer be today? A. I don't know.

RECROSS EXAMINATION

At the time I got up on Car No. 3 for the purpose of spotting Car No. 2, I could have gotten up on Car No. 1 and spotted No. 2 by applying the brake on No. 1, but I [88] would have been on the wrong end to see what Mr. Harris was doing. We never did it that way. I wouldn't know if ordinarily people who are braking cars get on the downhill side. If I had set the brake on Car No. 1 that would have prevented Car No. 2 and any other cars from going beyond it.

The coupling between Cars 2 and 3 was closed and appeared to be locked because the knuckles were together.

(Defendant's Exhibit 21 marked for identification.)

Exhibit 20 shows a coupler with the pin lifter resting on top of the coupler, but I wouldn't know what the lock box is. Defendant's Exhibit 21 appears to be an underslung type of coupler.

I don't know what the function of this piece of metal, which you call a lock block, performs.

The knuckle on Car No. 3 was open.

(Defendant's Exhibit 22 identified.)

[89] The coupler appearing above on Exhibit 22 looks open, but I wouldn't make any comparison with the coupler on Car No. 3. I wouldn't know whether the coupler shown on Exhibit 22 would couple. One appears to be open and the other appears to be closed.

I started working at Cargill in September of 1962, and in connection with my work at the meal house, assisted in the coupling and uncoupling of cars by using the brakes. I looked at couplers before, but not in any detail. I don't know one coupler from another. All I know is when you pull the pin lift lever it opens up.

Q. That's right. And you know when a coupler is opened by means of the pin lifter lever that you get the general appearance from looking down on the coupler that appears in this photograph, Defendant's Exhibit 22, is that correct?

A. All I know is when you pull the pin lift lever it opens up.

Q. And it looks substantially like the same as that one you [90] described in Exhibit 22 as an open coupler, isn't that correct? A. Looks like an open coupler.

Mr. Alfveby: I would object, Your Honor, and move the question be stricken. There is no definition of substantially the same. Would you like to lay additional foundation, Mr. Dallas?

The Court: Well, pardon me; I am going to sustain the objection. I think the witness has very clearly testified that he doesn't know anything about it. He is not in any position to be beneficial to this Jury with anything he has to say regarding these couplers. It will be all pure guess on his part. I think, Mr. Dallas, I am going to sustain any further examination about this.

Mr. Dallas: The only problem we have, Your Honor, he has given his statement about what an open coupler was and

I want to know how it differs from this one in this photograph here, and that is all I am trying to get at.

[91] The Court: And I believe he has conveyed to the Court, at least, his concept that an open coupler is what you have got when the two cars come apart, when you lift the pin and pull on the couplers and they come apart you have got open couplers on both sides. This is his understanding of what an open coupler is, as I understand it.

Lifting the pin lifter on Car No. 3 opens the coupler of Car No. 3, but does not open the coupler on Car No. 2. I don't know if it depends on how hard you push down on the pin lift lever. As to whether the coupler was open as far as it could be opened by means of the pin lift lever, all I know is the coupler appeared to be open. I did not touch the pin lift lever myself and I don't believe Mr. Harris did after he manipulated it for the purpose of uncoupling the cars.

Q. Now, have you ever made any tests to determine when you lift up on the pin lift lever to uncouple a car that coupling will open to the fullest extent it would if you didn't have a car there? [92] A. I don't know anything about the coupling.

(Exhibit 20 offered and admitted for illustrative purposes of a closed knuckle. Defendant's Exhibit 19 offered and admitted subject to the limitation that the cars pictured are not representative of the cars involved at the time except that they were both 40 foot long cars.)

I have taken a pencil and marked the light that appears in Photograph Exhibit No. 19 and written the word "light." There are more than that there but I don't remember exactly where they are at.

CHARLES MCGUIRE,

being sworn, testified as follows on behalf of plaintiff:

DIRECT EXAMINATION

My name is Charles R. McGuire and I live in Minneapolis, Minnesota. I am presently retired. Prior to retirement I was a switchman on the old Minneapolis and St. Louis, now the Chicago and Northwestern. I had been a switchman [93] for 41 years. A switchman makes up and breaks up trains, sets cars at industries, handles all freight cars and passenger cars in a terminal, and couples and uncouples box-cars. I acted in the capacity of a switch foreman, and for nine years I was a yardmaster. When I was an active switchman and, depending upon the particular job, I would couple and uncouple between 50 and 200 cars a day, or maybe more. From my work in coupling and uncoupling cars, and from my observations, I am familiar with the normal and usual method and manner in which couplers function while being coupled or uncoupled. The normal and usual manner of coupling cars is to bring the couplers into contact and both knuckles have to close. When they are closed properly, the lock blocks will drop and the cars will be coupled. One or both of the knuckles have to be open in order for a coupling to make; otherwise, if both knuckles were closed, the knuckles would just butt together and there would be no joint made. The only force required to couple cars is the force that will close both knuckles and allow the pins to drop. A knuckle can be closed by hand and [94] the pin will drop. No great force is required. In fact, the railroad's rule is that the coupling should not be made at a speed greater than four miles an hour to avoid damage to the contents of the cars.

Q. Contact made at a speed of less than one mile an hour, should the couplers close?

A. If the couplers close the joint will make.

Q. I say, a speed of less than one mile an hour, should the couplers close?

Mr. Dallas: Objected to as leading and suggestive and calling for the conclusion of the witness; no proper foundation as to circumstances under which the cars were propelled together; it is mere speculation and guess; no proper foundation as to the facts required as to when you have couplers making a normal coupling.

The Court: Overruled; you may answer.

[95] A. No great force is required. What was your question—a speed of one mile an hour?

Q. Less than one mile an hour. A. One mile an hour or less would close the knuckle.

One mile an hour or less would close the knuckle. If the couplers close, the joint will make. In the normal railroad operation there are various ways of bringing the cars together to make a coupling. The cars may be shoved by a locomotive; the cars can be cut off on the lead and kicked into a track and they will roll of their own momentum and make a coupling. With cars on a grade, handbrakes can be released and cars run down and make a coupling. They can be pulled by a cable, started, and a coupling made, or they can be moved by car jacks and couplings made. With regard to cars being coupled or not, the origin of the power of the car through these various means makes no difference whatsoever.

The normal and usual method to uncouple cars is to operate the pin lifter lever, pull the pin lifter [96] that will lift the block and uncouple the car. These pin lifters are located on the corners of the car. The handle that is operated is usually on the side, not between the cars. The usual method is to lift up on the pin lift lever. This operates to pull up the pin, that is, the mechanism connected to the lock block that will lift it up and disengage the lock block, allowing the knuckle to open. When the couplers are closed, they remain

closed unless opened in this usual and customary manner.

Q. Now, assume, Mr. McGuire, that two boxcars, two empty boxcars, were moved by means of an electric winch and a cable and they were brought together and against a string of four cars, the first one of which—which the contact would be made had a hand brake on the car, and a set hand brake, and that the coupler on the standing car was open, and the two empty boxcars came against these four standing cars with sufficient force to move the string of four cars with the brake on one of them a few feet to five feet, do you have an opinion, Mr. McGuire, as [97] to whether these cars should have coupled?

Mr. Dallas: That is objected to for the reason it is an interrogatory and the hypothesis is deficient in that it does not take into account the velocity and speed of the cars at the time of the impact, does not give the position of the attachment of the cable or winch at the time, does not take into account the fact that the attempted coupling was on a curve, and for the further reason it does not take into account the showing that the knuckle on the Car No. 3 was completely open, and it does not show what the condition of the knuckle was at all on Car No. 2, and in the absence of the adequate foundation the interrogatory is calling for mere speculation and guess.

The Court: Was the preceding part of the question whether he had an opinion?

Mr. Halloran: Yes.

The Court: You may answer [98] that yes or no.

A. Yes.

Q. What is your opinion? A. My opinion is that the coupling should make.

Assuming the same set of facts and further assuming that the coupler did couple, it is my opinion that to disconnect

the cars it would be required to manually operate the pin lifter rod.

In my opinion, moving boxcars by means of a winch and cable would have no material effect on the alignment of the drawbar because the cars are on rails, and are kept on the rails by flanges on the wheels.

CROSS EXAMINATION

I don't see why pulling a car with a winch or cable attached to the side of the car would not have the same directional force as when you are pushing it with or by a drawbar.

I have never been out at the [99] place where this accident happened and I don't know anything at all about the physical setup.

If the cars were on a sharp curve, that is a factor that gets into the equation in making a coupling. If you have a curve, as the cars round the curve they have to have sufficient lateral movement in the drawbars to permit them to go around.

Most of the couplers in use today are E couplers, but there are other kinds, including D couplers, some V ancient couplers, Guhl couplers. Majors, etc. Some couplers are designed to have very little lateral motion.

(Defendant's Exhibit 23 marked for identification, being a picture showing an E type coupler, of the overhead type.)

I see some space between the draw bar and the place at the side. I think the width of the drawbar, some of them are five inches and some of them are six inches. I don't recall offhand what the size of the shank is.

[100] The standard railroad cars are built according to the specifications prescribed by the Association of American Railroads.

The point which I have indicated on the photograph, Exhibit 23, by two marks represents the space between the side of the drawbar and the side of the housing. That is the area

which you call a striker opening width, or the space where the drawbar is between.

Some couplers have springs which keep them in lateral position and which require great force going around a curve, with another drawbar, to move them. Some don't have it. There are so many different lengths of boxcars, a lot of 50-foot cars, so I can't say that a 40-foot boxcar is an ordinary standard boxcar.

The photograph, Exhibit 19, is of a regular 40-foot boxcar of the kind commonly used. I would expect that kind of a car to be equipped with "E" type couplers. I couldn't tell you how wide the yoke would be on that type of coupler nor the maximum permissible lateral movement between this striker opening. [101] I imagine that there is a maximum permissible opening that is prescribed by the association of railroads and it has to be enough to permit these cars to negotiate curves.

There has to be a maximum permissible lateral movement of the couplers to permit the cars to negotiate curves, so one would have to bend in order to get the other one around the curve.

Q. And if you happen to have a situation where cars stopped where there was a curvature in the track you might have perfect couplers but in order to get a coupling there that would be certain you would have to have perhaps both knuckles open, isn't that true?

Mr. Halloran: Objection, Your Honor, in regard to the words, "perfect couplers."

The Court: Overruled.

A. No, I wouldn't agree with you. In my experience the best way to make a coupling on a sharp curve is you have to have one [102] knuckle closed, and it all depends on, you know, which way the curve is. To try it with both open wouldn't make it.

Q. Well, in other words, would you say— A. That is, if the curve is sharp enough, what you are referring to.

Q. What I am saying is this. In order to have these cars coupled, it is necessary to, oh, the car of one coupler strike a given place on the coupler, isn't it? A. Yes, it is.

Q. Now, take a look at this photograph that is marked Defendant's Exhibit 22. I will ask you to tell me whether those, based on your knowledge and experience in railroad-ing, whether that photograph portrays one coupler with a knuckle completely closed, is that correct? A. That's right.

Q. And this other coupler with a knuckle partially closed, is [103] that right? A. That's right.

Q. And under those circumstances would those two cars, if they were brought together, would they couple or not couple? A. They would not couple.

Q. Why not? A. Because this knuckle would close.

Q. In other words— A. The one that it's up against would close it.

Q. And you might have a situation where it might bounce over and strike this— A. Well, if it went in there it would couple. By the looks of this it couldn't get in there.

Q. In other words, you would have a situation where you would say it would be doubtful? A. I would say, if that came up. [104] there with the ordinary force it would close the knuckle on the car, the knuckle is partly open, and the joint would make.

Q. Now, you see the situation there where you can see— would those appear to be drawbars? The ordinary kind that we would expect to have attached to an E type coupler?

A. That's right.

Q. In other words, does that appear to you to be a situation that might very frequently arise where you were coupling cars where both cars were equipped with proper types of couplers? A. That's right.

Defendant's Exhibit 22 appears to be a situation where the couplers would not couple because the one knuckle would close the other, but if it went in there, it would couple.

If you had a situation where two cars were coupled together and moving by power supplied to one of them, and they remained coupled together until someone lifted up [105] on the pin lifter at which time the two cars separated, that would indicate that those two cars at that time were equipped with couplers that would remain coupled until released by the purposeful act of man. And there is no reason why those two cars, if you had the automatic couplers properly aligned and open, the knuckles open, and they were brought back together with proper impact, that those two cars would not recouple.

Usually industries use the car jacks in use today.

Q. That's right, and sometimes you might get a coupling with that sort of impact and sometimes not? A. You could get a coupling and sometimes not.

Q. Would it be reliable? A. Yes, it would be reliable.

Q. In other words, sometimes you wouldn't get the right jolt or jar? A. You don't need any jolt or jar.

[106] Q. You have some instances where you wouldn't be successful in getting a coupling by means of using a car jack as you would by switching cars with the railroad locomotive, would you? A. No, I wouldn't say that, I would say either method would be equally successful.

Q. Now, it's very possible under many circumstances to lift up the pin lifter on a railroad car and continue to push that car and the adjoining car for a long distance without recoupling occurring, isn't that true? A. If you hold it up.

Q. What I am getting at is this— A. If you held it up and it stays up. Depends on the smoothness of the track. It could drop or stay up.

Q. What I am getting at, you were talking about how

you switch cars off a lead track onto a siding and things of that kind. These couplers are equipped in [107] a way so that the switchmen can walk alongside of the car, lift up on the pin lifter, the locomotive can continue to push that other car until it gets down to the switch and then it goes off on the switch, isn't that true? A. But the pin can drop, too.

Q. It can, but may not even though the car is pushed for a long ways, isn't that true? A. It may not, yes.

Q. That's right, that's right. That depends if you have a jolt or jar or jiggle? A. Just depends on the evenness of the track.

Q. That's right, that's right. So you can't say just because a car was pushed by another car for some distance that that is a guarantee they would couple after they came together, that is true? A. Well, I think what you were advancing before was, if these [108] cars were coupled and being moyed and you lifted the pin, that the pin would stay up.

Q. That's right. A. Now, you have got the other side. You are bringing the car up against it. When you bring the car up against with sufficient force the pin should drop then.

Q. What I am getting at is this, so we don't have any misunderstanding about it. If you were switching cars off a lead track onto a side track you many times have walked alongside of that car and picked up and lifted up on the pin lifter and stood there and seen that car go down and turn off on a switch, didn't you? A. That's right.

Q. And still moving along there with the other car in impact against it, isn't that true? A. That's right, if it stays the same and nothing happens.

[109] Q. That's right. A. But it can, of you are pulling pins on the lead you better be around, if the pin drops and you don't make the cut the foreman is liable to be a little angry with you.

Q. But you still have that continued impact between the two couplers but the pin doesn't drop unless you get the right recoil, is that correct? A. It can be unevenness in the track. If something happens to change the speed on either car, anything can cause that pin to drop.

Q. In other words, the ordinary speed at which, oh, couplings would be made by means of a locomotive would be—you say they shouldn't make them more than four miles per hour because that might damage the equipment, is that correct? A. That's right; not the equipment, but the contents.

Q. I see. In other words— [110] A. Too much of an impact.

Q. That's right, that's right, and you might not get a coupling because you hit the thing too hard and it bounced up and stuck, wouldn't it? A. You could hit it so hard the car would bounce back before the pin dropped.

Q. That's right. And you could have a situation the impact is too soft, you don't have enough recoil to drop it, isn't that true? A. The only thing you could have, if you didn't get all the way up and make the full—all that is required is this knuckle completely closed.

Q. And when you say get all the way up, you are meaning in those photographs I called your attention to, if you had something that deflected the course of one knuckle that was not completely open it gets you around into a situation where you could push along and ultimately get the knuckles [111] closed but the pin wouldn't drop, isn't that true?

A. Not if you got the knuckles closed the pin would drop. That is a function of the knuckle when it is properly closed the pin will drop.

Q. Depends on how much impact you had at that time, isn't that true? A. I still say the impact has nothing whatever to do with it. If you get the knuckle completely closed the pin will drop.

Q. Now, you say that if somebody came alongside of a railroad car and, oh, lifted up the pin lifter and the pin lifter opened the knuckle, that that, oh, car was equipped with a kind of a coupler that would enable, oh, the cars to be uncoupled without the necessity of men going between the cars?

Mr. Alfveby: Objection, Your Honor, that incorporates improper material into the [112] question.

The Court: Overruled, you may answer. You may answer, Mr. McGuire.

A. Yes, the car would couple without a man going between the cars.

Q. That's right, that's right, and that kind of a coupler that would do that would not be defective, would it?

A. It wouldn't be defective at that time opening the coupler.

Q. That's right, that's right. Now, if you had two cars coupled together in that sort of a way, that would indicate at the time they were uncoupled the drawbars had to be properly aligned, wouldn't it? A. At the time they were uncoupled?

Q. That's right. A. They had to be properly aligned.

Q. That's right, that's right. A. They would have to be straight [113] enough so they could be uncoupled, that's right.

Q. That's right, and that would indicate to you each of the drawbars would be the proper height for the coupling?

A. No.

Q. If they were coupled together? A. I have seen cars coupled together with that much coupler on them and they could still be uncoupled.

Q. If they were in a position where they remained coupled until uncoupled they were properly coupled, isn't that right? A. Yes, but it wouldn't indicate the height of the drawbars.

(Defendant's Exhibits 24, 25 and 26 marked and Defendant's Exhibits 23, 24, 25 and 26 admitted into evidence.)

Exhibit 24 shows component parts of an underslung type coupler. The part identified as No. 2 is called the lock block. Its function is to [114] keep the coupler closed. No. 4 on Exhibit 24 is called the knuckle thrower, and No. 8 is the pin lift lever. No. 5 is the pin that attaches the knuckle to the drawbar. The knuckle thrower and the pin lifter attachment, as well as the lock block and part No. 3, the link between the block, which is attached to the pin lifter rod, all can break.

Exhibit 25 depicts an underslung type of coupler composed of the parts such as shown in Exhibit 24. If the lever or link shown in No. 25 and designated No. 3 on Exhibit 24 were down below the indicated position, it would indicate to me that the block was down and that the coupler was locked.

Looking at that same part, the link or lever, on Defendant's Exhibit 26, would indicate to me that the block was up and the coupler could open. If I came up and saw what appeared in Exhibit 26, it would appear that the knuckles were closed but the block had not fallen. When a coupler appearing like that in Exhibit 26, you wouldn't pull the car at all.

[115] When I am talking about a coupler being open and closed, I am talking primarily about whether the knuckle is open or closed.

(Defendant's Exhibits 27 and 28 identified, and Defendant's Exhibits 22, 27 and 28 admitted for illustrative purposes.)

Defendant's Exhibit 22 depicts two couplers, one knuckle in a closed position, and the other one appears like it could be fully open. It is out of line and the joint could not mate. The two couplers depicted in Exhibit 27 are both open, both knuckles are open, and in my opinion would result in a coupling.

Q. Now, Mr. McGuire, I call your attention to a photograph that has been marked Defendant's Exhibit 28 and ask you if that appears to be the usual and ordinary type of coupler that would be found on a railroad boxcar but of the overhead type, is that correct? A. That's correct.

Q. And take a look at what you [116] observe in that and assume that you came up to it that would indicate that the knuckle was closed, or at least partially closed, is that correct? A. That's right.

Q. But the pin had not dropped, is that correct?

A. That's right.

Q. And that means the lock block you see underneath there has not fallen down to form the wedge essential to make a firm coupling, is that correct? A. Yes, it looks to me as though the knuckle is open enough for the flange to hold the lock block from dropping all the way.

Q. I see. Assume someone accustomed to moving cars came up and saw a knuckle closed, as it appears here, but with the pin up as it appears in photograph 28, would he proceed to move those cars without doing something further?

[117] Mr. Alfveby: Objection, Your Honor; the question goes to a question to be determined by the Jury.

The Court: I will sustain the objection.

Mr. Dallas: In other words, one accustomed to moving cars, would he know whether there had been—making an observation such as you have made here, would he know whether that car was firmly coupled or not firmly coupled?

Mr. Halloran: Same objection.

The Court: Overruled; you may answer.

Mr. Halloran: Just a moment; just a moment.

Mr. Dallas: He overruled your objection.

Mr. Halloran: I didn't hear it.

A. If you saw it like this it wouldn't be coupled to any-

thing. It is just sitting there. It. [118] has no connection with another car or anything else.

Mr. Dallas: That's right; that's right. Now, on the basis of the testimony, Mr. McGuire, the defendant offers and introduces into evidence Defendant's Exhibit 28, not to claim this is any coupler involved out there but illustrative of the way they appear under the circumstances he has detailed.

Mr. Halloran: No objection with the understanding it is for illustrative purposes of a coupler which shows what it purports to show, the coupler is partially open and partially closed.

Mr. Dallas: That's right.

The Court: Be admitted.

Q. Now, Mr. McGuire, in your 41 years' experience as a switchman have there been times when you have come up to cars and it appeared to you the couplers were properly set to couple and an impact occurred and they did not couple?

[119] A. Yes.

Q. And have there been instances like that when you have gone up and lifted up on the lift pin and had another impact and they did couple? A. Well, I don't just understand what you mean. I have had instances where you would lift up on the coupler and jiggle it or something and it would drop.

Q. In other words, I think you understood the first part of my— A. It would work one time and not another.

Q. That's right? A. That's right.

Q. And those instances when it's done that you have been able to effect a coupling without the necessity of going between the cars to do it, haven't you? A. Not always.

[120] Q. Many times you have? A. Many times, yes.

Q. That's right. Now, the usual and customary method that is employed by people who are moving cars is to go up and make observations, first to see whether the pin dropped, isn't it? That is one of the observations, isn't that true?

A. Well, if you mean, if you are standing alongside of them and coupling them—

Q. Or about ready to have them move away and you want to be sure they are coupled you would make an inspection to see whether the pin dropped, is that true?

A. Well, that would depend if you were handling a couple of cars. If you were handling a couple (appellant maintains that here the witness used the word "string," not the word "couple") of cars you wouldn't inspect every knuckle to see if it was closed.

[121] Q. If you had a situation like that before you undertook to move that string you would want to maybe do what a railway man calls take up the slack to see if they are coupled? A. You would take up a stretch of cars.

Q. And you do that as a caution to see they are all securely coupled before you undertook to move the string, isn't that true? A. That's right.

(Exhibit 21 admitted for illustrative purposes, showing a coupler of the underslung type, with the lock block fallen.)

The photograph, Exhibit 21, shows the situation where if that coupler was attached to another car it would be firmly coupled.

REDIRECT EXAMINATION

I believe the coupler shown in Exhibit 28 is a proper working coupler, but I don't think it is fully [122] closed. It appears that the lock block is being held up by the flange on the shank of the knuckle and the pin cannot drop. Assuming that this was opened by pulling the lever on the side of the car and the pin comes up, in a properly working car the knuckle should open all the way. Exhibit 25 depicts an underslung coupler, which is closed, and the pin is down. In my opinion, with the knuckle closed the pin should be down. That is the way it should look with the knuckle closed and the lock block in locking position.

Assuming that there is a string of six cars, coupled together, standing on a track running north and south, and assuming it is desired to take two northerly cars away from the string, and to accomplish this a man pulls up on the pin lift lever on the third car, and assuming there is a cable and winch attached to the second car from the North, by means of which the two northerly cars are pulled northward after the pin lift lever has been pulled out, and in this operation the coupler opens and the two cars pull away, I have an opinion as to whether the knuckle [123] on the coupler of the third car which was opened by the pin lift lever should open the whole way or just partially. My opinion is that the knuckle should open the whole way.

Q. Mr. McGuire, assuming the first set of facts I have given you where the first set of cars were uncoupled by the pin lift lever having been operated on the third car, and the car's coupler opened sufficient for the cars to move northward, and assuming further, Mr. McGuire, that with that set of facts the cars were brought back together, should the coupling have made? A. Yes.

Mr. Dallas: Wait just a minute, here, Your Honor, that bases on the assumption, there is an inadequate foundation because of the failure to show no change in circumstances, or there is an assumption of facts not shown by the record in order to render this opinion permissible.

[124]. The Court: Well, this witness has testified that he can express an opinion on the matter without knowing what happened to the couplers in the meantime, and if he can he is entitled to do so. He may answer.

Q. Do you have an opinion, Mr. McGuire? A. Yes, yes, I thought I just expressed it.

Q. And your opinion was— A. My opinion was what you have told me, the cars brought back, they should couple.

There are things other than broken parts which can cause couplers not to work automatically by impact, such as wear, rust, evaporation, ice can get into the inner working parts and prevent the block from dropping, and snow can get into an open knuckle requiring one to dig it out before the mechanism will operate. Because of such factors the couplers can work one time and not another.

[125] RECROSS EXAMINATION

Ice can accumulate because of condensation, temperatures changing from day to night, or from frost, things that cause condensation and freezing. This would affect the inner part of the coupler, if you released the lock block by pulling the coupler operating lever, it might not go back down when the impact was made. The ice can accumulate on this flange that operates the lock block, on the shank of the knuckle. There could be enough ice in the lock block to hold it up when it is closed. To knock the lock block down you would have to clean it out, chip some of the ice away. A driving rain, or condensation overnight and in the morning a sharp change of temperature could cause moisture to get in there.

Q. If it appeared these cars, the third car and the second car had been setting there coupled together and there hadn't been any severe condition of snow and ice in the month of March, and they were uncoupled by the lifting up of the pin lifter, and the two cars were taken [126] down and being weighed, and they brought the thing back and in a period of half an hour, or an hour, would you say that that condition of frost under those circumstances during the month of March 21st would be a likely condition? A. It could be one of the conditions. Wear or dirt in there, or anything could cause a pin not to drop.

The operating mechanism, a part such as the knuckle thrower, the pin, and lock block are cast steel parts which

are not machined, and through operating close tolerances can develop, and any little malfunction in them can cause them not to operate. Rust could flake off—it doesn't take much to stop a pin from dropping if everything isn't perfect. A piece of broken casting can get into the flange, jamming it so it will not operate. With a situation like this the pin lifter might open the knuckle one time and not the next.

Q. It would be very unlikely you would have anything like that? [127] A. It just depends what the breakage is.

Q. Well, there are many, many times that you have these situations where a coupler may not work on one occasion and then your normal procedure is to go back and lift up on your pin lifter and take another whirl at it, isn't it? A. It all depends. There is a lot of times you can drop the block by movement underneath.

Q. I don't want some situation, Mr. McGuire, where you have to have men go between the cars. A. Uh-huh, otherwise you would have to pull away and make another movement.

Q. That's right, and when you had a situation like that the normal procedure would be to go up to your pin lifter and open the pin further to be sure that wasn't a cause of it and then make another try at it, isn't that true? A. That's right.

[128] Q. And if it worked on that second try, why you would have a coupler that would couple automatically on impact without the necessity of men going between the cars, wouldn't you? A. That's right.

Mr. Alfvey: Objection, Your Honor, invading the province of the jury.

The Court: Overruled.

Q. Now, some question was made about opening up on the—lifting up on the pin lifter, and if the pin lifter was functioning, oh, it would permit the thing to be opened suffi-

ciently to permit the cars to be uncoupled without the necessity of men going between them, isn't that true?

A. That's right.

Q. And you might have the movement of the cars under some circumstances where it might not open the knuckle clear open, isn't that true? A. Well, the only way you would [129] have that was if there were something wrong with the knuckle.

Q. Well, in other words you could have a situation where you could have a situation where you opened the—lifted up on the pin? A. Lifted up the pin lifter.

Q. Maybe for some reason or other looked like it would probably make to you and then you tried it and it didn't and you went back and tried to lift up on the pin lifter again and got it opened up farther, why then that you would say was a satisfactorily functioning coupler on the second time around, wouldn't you? A. Yes, if it wasn't properly lined up.

BETTY WHORTON,

being sworn, testified as follows on behalf of plaintiff:

DIRECT EXAMINATION

My name is Betty Whorton, and I am Record Librarian of Mercy [130] Hospital. I brought with me all records concerning Ronald Crane.

(Plaintiff's Exhibits 29, 30 and 31 identified, offered and admitted into evidence, with the exception of certain recitations in said records by plaintiff as to how he received his injury.)

Exhibit 29 is the medical record of Ronald Crane from November 13, 1963 to November 20, 1963. Exhibit 30 is the medical record of Ronald Crane from March 21, 1963 to

March 29, 1963. Exhibit 31 is the out-patient record of Ronald Crane from March 21, 1963 to the present time.

EARL Y. BICKEL,

being sworn, testified as follows on behalf of plaintiff:

DIRECT EXAMINATION

My name is Dr. Earl Y. Bickel and I am an orthopedic surgeon. I practice my profession in Cedar Rapids, Iowa. I had occasion to see, treat and examine Ronald Crane. I was first called in, in consultation, by Dr. Donald Bomkamp, on March 21, 1963. The patient [131] sustained an injury to both feet when he fell from a boxcar at Cargill on March 21, 1963. X-rays demonstrated fractures of his heels or os calcis.

(Plaintiff's Exhibits 32 through 36, inclusive, being X-rays of Ronald Crane, and Plaintiff's Exhibit 37, being a plastic replica of the bones of the lower extremity, including the foot, offered and admitted.)

Crane sustained fractures to the os calcis in both his right and left foot. Crane was discharged from Mercy Hospital on March 29, 1963. Crane also sustained injuries to the ligaments in the areas around the fractures, as well as soft tissue injury, which is sometimes more severe than the bony injury itself. The left ankle and left foot developed more pain, and on November 14, 1963, it was determined that an arthrodesis, or making this particular joint stiff, would relieve him of his symptoms. This operation was done by me on said date. He was discharged on this second occasion on November 20, 1963. The arthrodesis relieved the arthritis caused by the trauma, [132] which was involved in the subtalar joint, which was fused. I believe there is a causal relationship between the condition of ill-being he has that I have explained, up to the present time, and the accident. It

is related to the original injury. It is my opinion that at the present time he has an impairment of the right lower extremity of twenty-five per cent of the lower extremity and on the left side he has impairment of thirty per cent of the left lower extremity. In my opinion this impairment is permanent. My bill for care and treatment of Ronald Crane was \$564.00, which was fair and reasonable for the services rendered. I believe the bill for \$307.00 from Mercy Hospital for Crane's hospitalization from March 21 to March 29, 1963, was fair and reasonable. I also believe the hospital's charge of \$85.00 for out-patient services was fair and reasonable, as well as the bill of \$229.09 for his second hospitalization in November of 1963.

Presently, Ronald Crane is suffering from injuries to his feet and ankle area which will limit him in some of the things that he can [133] do, especially it will limit him in the number of jobs that he can hold, jobs which will necessitate him being on rough ground, crawling up and down on ladders, or in dangerous places. It will also eliminate some sources of his employment just from the injuries that he sustained. It can severely handicap him if he had to work rapidly. He has difficulty in rapid motions. He can't run, except with an excessive limp, and if he is doing something of a prolonged, repetitive nature, this will cause him pain and disability also. He is presently suffering from pain, which in my opinion is real, and which will be permanent. He also has a permanent limitation of motion.

WILLIAM HARRIS,

being sworn, testified as follows on behalf of plaintiff:

DIRECT EXAMINATION

My name is William A. Harris, and I live in Cedar Rapids. I am presently employed by Cargill in the capacity of meal house operator. I have worked for Cargill for 13 years. I was the meal house [134] operator on the morning of March 21, 1963. Ronald Crane was the meal house helper on that date. Our work at the meal house includes finishing processing soybeans, grinding them and sifting it and loading it into cars, moving boxcars down and spotting another one, and loading different orders. The Crandic Railroad brings the empty boxcars into the Cargill plant. No other railroad that I know of brings cars to Cargill. We had to weigh, that morning, two empty cars which were the first two cars on a string of cars on the meal house track. The cars to be weighed were on the north end of the string. I hooked the cable from our winch onto the south end of the second empty car. I told Crane to get onto the brake on the third empty car, because we weren't going to take all the cars down to be weighed so I told him to bring them down half a car length or so, so that when we pulled back the empties they would couple together and they would all be in the string coupled together and we wouldn't have to drag the cable back the other way to get the cars. Crane was to apply the brake at a signal from me. After I got the cars moving, I would break the two [135] empty ones off and then I would tell him to tighten the brake up and stop this other string of cars when we got to a certain spot along the dock. The two empty cars were coupled to the third car. When I gave the cars a pull with the winch, I then went over and pulled the handle on the side of the third car, the same one that Crane had gotten up on the brake platform of. The

cars were rolling when I pulled the pin. I don't remember if the cars came completely uncoupled as soon as I pulled the pin, but as soon as he tightened the brake up on the third car, the couplings pulled apart and the two empties went down towards the elevator. The two cars were weighed at the scale in the elevator shed which is north of the meal house approximately five or six boxcar lengths.

When those two empty cars were brought back to the meal house area after they had been weighed, I operated the winch that pulled them back. I don't remember whether I hooked a cable onto the cars or whether somebody down at the elevator hooked the cable on. The cable would be hooked onto the north end of the first empty car [136] which we were bringing back. We then pulled them back and spotted the first car so that we could load it with the bulk. These two empty cars made contact with the third car which was in the string from which it was separated earlier. I was not exactly in line with the coupling on the cars to see these cars make contact, but I did see them push the other cars back.

When the two empty cars were brought back, they made contact with the standing cars, and in my judgment pushed the standing cars back maybe half a car length or maybe less. The first car on the north end was spotted for loading. After loading the first car we proceeded to spot the second car for loading. We went around to the winch side and I hooked the cable to the north end of the second empty car. I told Crane to get up on the brake of the third empty car in the line when we originally started. His purpose was to control the movement and stop it at the right place. I started the winch to move the cars toward the north. The cable tightened up and only the first two cars started to move. The remaining [137] cars in the string didn't move.

When these cars started pulling away my immediate reaction was to first run to get a brake on one of them. I ran down to the north end of the first car that was loaded and there wasn't a brake on that end of the car, and when I got in between the two cars that were going down I saw a brake there, but I didn't want to grab it so I ran back to the first empty car.

I wanted to stop the cars before they got down to the elevator. They unload beans there and had men working in the cars, and there is also a switch for the bean track which I was afraid might be set for cars to come off the bean track. These cars could break the switch or even derail. As close as I can recall, there was a car sitting on the scales in the elevator at that time. I ultimately set the brake on the south car of the two cars involved, after first running to the north end of the first car, where there wasn't a brake on that end, and I didn't want to climb up and apply the brake between the two cars, so I ran back to the south car. After I got the brake set, I [138] noticed Crane, who was in between the tracks on the concrete slab in front of the meal house. I learned that Crane fell off of the car that I ultimately applied the brake to.

At the time I succeeded in setting the brakes and stopping the cars it wasn't much farther down than the plant office, right there by the gate by the plant office.

Since March 21, 1963, the meal house tracks have been repaired, ties have been replaced. Some railroad gang, as far as I know, did the work. It wasn't anyone from Cargill. I couldn't say whether the tracks have been raised, but they appear to be. To the south of 12th Avenue the meal house track connects to some other tracks, and north of the elevator the tracks go across 8th Avenue.

Prior to this morning of March 21, 1963, I had observed loaded cars which were being brought from the meal house

to the elevator, which, when running free, had gone all the way to the elevator as far as rolling up onto the scale, part way onto the scale.

[139] CROSS EXAMINATION

I got those two cars stopped by applying the brakes on the most southerly of the two moving cars. The most northerly car was a loaded car, and the car I got up on and applied the brake was an empty car. The loaded car was down in front of the office gate in that general vicinity. Then when I came back I saw Mr. Crane sitting down on the cement that is between the tracks near the loading dock. At that time he was south of the winch, the exact distance I couldn't say, but half of a car length south of the winch would be a fairly close approximation of his position as I observed him after I came back.

I don't believe I stopped them in ten feet. It might, but I couldn't say any distance.

I cannot give you the specific type of brake which was on the railroad car which I succeeded in stopping, but in any event it had a good, satisfactory brake. The photograph which has been marked Defendant's Exhibit 19 shows a situation where railroad cars are standing on the track in the same positions as [140] the railroad cars at the time of the accident. At the time of the accident, what we have described as car number one would be in the position where this C. & N. W. car is shown in the photograph, Exhibit 19. Car No. 2 would be in the position where this one is that has an "E" on it. Then the car upon which Mr. Crane got up on would be back 40 feet west of there.

I hooked the winch onto the south end of the second car, not the north end. The winch we used then is the same one we have now. It has only one speed.

The winch was a single speed winch and works the same

now as it did at the time of the accident. You can't speed it up or slow it down, and you can't shift gears. When I pushed down on this button and started the cars to moving I shut off the winch by taking my hand off the winch. I then walked back and broke the coupling. Sometimes I would walk and sometimes I would run back. Anyway, I got back to where the cars were moving and lifted up on a pin lifter lever, such as appears in the photograph, Exhibit 15, which shows a pin lifter [141] lever, although it wouldn't necessarily be the same type it would nevertheless serve the same purpose. The pin lifter lever would extend either underneath the coupler or on top the coupler and I can't tell you which way it was. I lifted up on that pin lifter lever on the car on which Mr. Crane was riding and when I did this I don't know exactly whether the cars came apart at that instant or not, or whether they came apart a little later. Anyway, they started to move down towards the elevator and I went back to loosen the drum on the pulley on the winch so that it would be free so that the cable would be dragged out towards the elevator. All that I am able to tell you from my own personal knowledge is that they did become uncoupled and the full car and the empty cars behind it moved on down towards the elevator.

It was a dark night. I wouldn't say whether it was cloudy that night. Photograph, Defendant's Exhibit 19, represents the location of lights that lighted the area at that time, and in addition there were lights underneath the shed and also lights that shined on the track. The lights which shined on the track [142] would be right by the steps which are shown in Plaintiff's Exhibit 2. I have put an arrow right there by these steps and also put the word "light" in there.

The only lights that would light up the area south of the loading dock would be lights that are underneath the shed. You can see the light bulbs in this photograph. There are

also lights which were built back into the dock, along the bottom of the loading dock, that would be on the southmost end of the dock. That light would be about two and one-half feet from the ground.

In that operation which I have described there, while the cars were moving I gave some signal to Mr. Crane as to where I wanted him to stop this Car No. 3. I either told him about how far to let it go, or I hollered to him to stop. Which it was I don't know, but I did give him some kind of instructions as to where and when to stop the car, and I know he did apply the brakes and it did come to a stop. It is my general belief that conditions today, so far as the elevation of the rails [143] in front of the loading dock, would be the same or substantially the same as they were in March of 1963.

The work which was done on the meal house tracks has made a difference in the way the cars roll towards the elevator. Since the work was done, after the accident, it seems like the rise in the tracks located by the office or these tanks, is higher so the cars don't roll quite as good through there as they used to. I believe the grade in the tracks at the meal house and the elevator itself is substantially the same.

I have indicated on the photograph, Plaintiff's Exhibit 13, the words "Plant Office" to indicate the place where I say we stopped these cars approximately. After we had loaded this Car No. 1 we wanted to spot Car No. 2, and the only reason we had for trying to couple Car No. 3 to Car No. 2 is that when we wanted to ultimately spot Car No. 3 we wouldn't have to lug that cable out there.

I have indicated on this photograph, Defendant's Exhibit 19, the [144] word "winch." That indicates this object which appears in that photograph between the opening and the two pieces of wire fence. That is where the meal house winch is located. After I put this hook on and I walked

back to the meal house winch for the purpose of beginning to move the cars, and I told Mr. Crane to climb up on Car No. 3 for the purpose of stopping Car No. 2 when it got spotted. I then put my finger down on top of the lever on top of the winch and the car started to move, and when I did that I observed that Car No. 3 wasn't moving. These other cars had not proceeded too far before I made that discovery because as soon as you pull you can tell the space in between the cars starts getting wider, and you know they are moving without the other cars. I couldn't give any definite distance this Car No. 2 had proceeded towards the north before I turned off the winch. As soon as I discovered they had gone a very short distance I released the winch and started to move down towards the north for the purpose of getting these cars stopped, and I have gone into that procedure as to [145] what I did when I went down and then came back and got the cars stopped in front of the plant office, and then went back and discovered Mr. Crane lying down on the track.

After operating the pin lifter lever on Car No. 3 during the weighing movement, I did not again touch that pin lifter.

I never had any occasion to manipulate any pin lifting lever on what would be the meal house side of the car. If one of those cars that we were endeavoring to spot moved beyond the place where we wanted it spotted, you would want to get it stopped so you wouldn't have to pull it back. It wouldn't be any matter of great consequence, except it would be more work. If you have cars that you are wanting to spot you want to get them stopped as near where you are ultimately going to spot them as you can.

I believe it would be fairly close to between 3:00 and 3:30 in the morning when this occurrence took place. It was real dark outside.

[146] If you have a 40-foot car you would have about

half a car length south of the winch, and half a car length north of the winch when it was set in the right position to load, and we wanted to end up in a position where Car No. 3, which is the one on which Mr. Crane was standing, was sitting approximately in the same position after we made that first movement as the car with the "E" on it, which is shown in Exhibit 19.

I couldn't say for sure whether there was a car being unloaded at the elevator scale at the time of the accident or not.

REDIRECT EXAMINATION

At the time that I placed the cable on the south end of the second car to spot Car No. 2 for loading, I had the opportunity to observe the condition of the knuckles between Cars 2 and 3. They appeared to be coupled. To the best of my recollection there was a car being unloaded at the elevator, but I am not positive.

[147] RECROSS EXAMINATION

By Mr. Dallas:

Q. Mr. Harris, on December 18th, 1964, you had a talk with Mr. Ted Lewis, a lawyer in this case here, you know, a man a little shorter than I am? A. I could have. I couldn't tell you truthfully.

Q. You made a statement to him that was transcribed onto a dictaphone, didn't you? A. I did talk to someone with a dictaphone, yes.

Q. I want to call your attention here, did you ever get a copy of this thing here? Did Mr. Lewis give you a copy of it after it was transcribed? A. I don't believe so, no.

Q. Read this over here where it says, "Harris." You read that over and then I'm going to ask you if that refreshes your recollection about the situation?

[148] A. It seems like—

Mr. Halloran: Just a moment, just a moment, may I see that?

Mr. Dallas: You sure can. I am calling his attention to this last paragraph that says, "Harris" and I am going to ask him a few questions about it. If you want to use the whole paper you can, I don't care.

Q. Mr. Harris, I showed you this paper and you had an opportunity to read the thing and I am going to ask you now if this isn't an accurate reproduction of what you told Mr. Lewis on December 18th, 1964, what you transcribed. Mr. Lewis asked you this question: "Then when you pulled them back you pulled them back up against the UP car?" Do you remember he asked you that question, is that correct?

A. I believe that's correct.

Q. But whether it was in fact an UP, that was information he had rather than what you had?

[149] A. That's correct.

Q. Then your answer was, Mr. Harris, was, "Right, when we got ready to pull down I figured these were coupled and hooked, the couplings were together so I just figured, I didn't pay much attention to see if the pin had fallen but the couplings were together so that is why I hooked the cable on the second car so I didn't have to pull the cable way out." Is that the answer you gave? A. That's approximately what I said. I couldn't remember now if that is exactly what I said.

Q. But you did not make an examination of those cars to determine, oh, you didn't see the pin? You wouldn't know— A. No, I didn't.

Q. That's right. So if you had looked you would have seen, but you didn't look, is that right?

[150] Mr. Halloran: Just a moment, I object to that on the grounds it is calling for a conclusion.

Mr. Dallas: I will withdraw the question in that form.

Q. In other words, your observation was not sufficiently complete to enable you to determine whether the pin had dropped?

Mr. Halloran: Object to that, too, as ~~repetitions~~ and incompetent, the witness has already answered the question.

The Court: Overruled, you may answer.

A. No, I didn't look to see if the pin had dropped.

Mr. Dallas: That's right. That's right, Thank you.

REDIRECT EXAMINATION

When I hooked the cable to the second car to move the car up for spotting, what we did that evening was the usual and customary procedure [151] we carried out in moving the cars. We don't always check every car perfectly to see if it is all coupled together.

RECROSS EXAMINATION

By Mr. Dallas:

Q. In other words, what you are saying, you didn't pay too much attention to see whether cars were coupled ordinarily, is that correct? A. I didn't look to see if the pins had dropped, that's correct.

Q. You knew that was the only way you could tell whether cars were securely coupled, didn't you?

Mr. Halloran: I object to that as incompetent, irrelevant, immaterial, and not proper recross examination.

The Court: Overruled.

A. When I saw the knuckles together I just took it for granted they had been closed. I didn't take that much of a look any further.

[152] Q. Well, this look that you made, was that a look from the side, or top, or how was it? A. From the side standing between the cars.

Q. From the side. Then you can have a situation there where you can have—the knuckles can be partially closed and you wouldn't be able to tell from the side whether they were clear closed or not, you know that, don't you?

A. That I wouldn't know.

Q. And you didn't look down from the top at all?

A. No, I did not.

* * * * *

Q. Well, in other words if you are looking at the knuckle alone would it be proper to say that it would appear it was closed, but if you are looking at the pin you would know it wasn't closed? A. If I was looking at the pin [153] directly I would know it wasn't closed.

Q. If you were looking at the knuckle alone?

A. I couldn't tell.

* * * * *

Q. The only part of the coupler that you saw was the knuckle, is that correct? A. The knuckles on the two couplings is all that I observed.

Q. That's right, that's right, and let's get at it this way. You know by looking at that and looking at that alone you can't tell whether the pin had dropped? A. That's right.

GERALD DONALD DRALLMEIER,

being sworn, testified on behalf of plaintiff as follows:

DIRECT EXAMINATION

My name is Gerald Donald [154] Drallmeier and I live in Lisbon, Iowa. I am presently employed by Cargill as an elevator operator, and have worked for Cargill for 91½ years. North of the elevator the meal house tracks hook into other tracks of the Crandic Railway. Crandic Railway brings

cars in for loading and takes them out after unloading. I have observed cars started up by the winch at the meal house and which are placed in free movement, all the way to the elevator shed. Since March 21st there has been a change in the elevation of the meal house tracks. I place my initials, G.D.-1, where the rise used to be in the tracks, and G.D.-2 where the rise is now. I believe the rise is less now than it used to be. The initials are placed on Exhibit 3. (Note: Record isn't clear as to whether initials marked on Exhibit 3 or 13.)

CROSS EXAMINATION

I have been down there nine and one-half years and the place where the cars were loaded in front of the loading dock would be under this place which is marked "X-2." There is cement between the tracks [155] at that place and as far as I know the elevation as it now exists is exactly the same as it was back in March of 1963.

The grade used to start where D-1 is, and now they worked on the track and there is a small hump at D-2, instead of back where D-1 is. The track is presently higher at point D-2 than it was back in 1963. Depending on the weather, the cars from the meal house ordinarily stop short of the elevator. Between the elevator and the meal house, Cargill employees move the cars.

Empty railroad cars when they are brought in are set out and stopped ordinarily before they get down to the loading dock known as "X-2." There is no occasion to set out anything except empty cars on the meal house track. After these empty cars are set out there it then becomes the job of the meal house operator and his helper to manage those cars from then on until they are loaded. Their operation is all done by means of a winch. There isn't any movement of any railroad cars between these points "X-2" and "X-3" by

means of [156] any locomotive or anything like that, and that is an operation that is conducted entirely by Cargill employees by means of Cargill's facilities, and no railroad has anything to do with that at all to my knowledge. After you get a car loaded you then hook the elevator winch onto it and move it off to the north side of the elevator, and it would then be picked up by the railroad.

REDIRECT EXAMINATION

There are a number of factors which go into the reason why cars started at the meal house may go all the way to the elevator, such as a damp or wet track, ball bearings on the wheels, whether the cars are loaded or unloaded.

CHARLES POLLET,

being duly sworn, testified on behalf of the plaintiff as follows:

DIRECT EXAMINATION

My name is Charles A. Pollet, and I live in Cedar Rapids. I am presently employed as a meal house operator, which I have done for [157] $4\frac{1}{2}$ years, and I have worked for Cargill for 17 years. Since March of 1963 there has been a change in the meal house tracks between the meal house and the elevator. Since the change the cars do not roll as fast as they did in 1963, but even with this change, I have observed them on occasions rolling all the way to the elevator.

CROSS EXAMINATION

If a person were to go out and look at this track there is not enough of change in the grade that you would be able to tell it by looking at the track. It looks to an ordinary eye to be pretty nearly level. It is not a case where we are dealing with anything where you have any down hill or anything like that. Ordinarily if you were loading cars and starting them with a winch, they would come to a stop some place down here before they entered this elevator shed "X-2." That would be ordinarily true depending on the conditions. The ordinary procedure would be to start the cars and have them go down there and stop and somebody else down at the elevator shed would have to take the elevator [158] winch and pull them in on the scale to weigh them. That is the ordinary procedure.

In March of 1963 and at the present time, from the meal house toward the elevator, the tracks appear to be level, but there is a slight grade.

THEODORE WIENANDS,

being sworn, testified on behalf of the plaintiff as follows:

DIRECT EXAMINATION

My name is Ted Wienands. I live in Cedar Rapids. I have worked for Cargill, Inc., for 21 years, and on March 21, 1963 was, and at the present time am, employed as a supervisor over the whole plant. Since 1950 Cargill has been moving cars between the meal house and the elevator by means of a winch. Crandic Railroad engines and crews are switching in that area all the time, and have seen our movement of the cars by means of the winch. I have never seen any railroad other than the Crandic bring in cars on the meal house

track. Also, Crandic Railroad takes the cars [159] out after loading on the meal house track, beyond the elevator, where the meal house track ties into other tracks of the Crandic Railroad.

Q. And you have been present when your employees have participated in the movement of cars? A. Yes.

Q. And that movement of cars included the coupling and uncoupling of cars, is that true? A. Yes, that's right.

Q. And when you have observed, when you have been doing the work or observed your employees doing the work, I will ask you if you also observed whether the Crandic Railroad crews were present while this work was going on at any time?

Mr. Dallas: That is objected to as being excessively leading, suggestive, extremely complex and voluminous, and includes by statement whether Crandic employees were present which might have been any place [160] within view and any position, whether they were in a position to observe in minuteness of detail what these men were doing, whether they were coupling or uncoupling cars.

The Court: Have you finished your objection? The objection will be overruled, the witness may answer if he knows, if he understands the question. If the question is clear enough to him. And further, in the case of an affirmative answer, clarify what is meant by present.

A. I can't answer that, no.

Q. Have you been present during the day, Mr. Wienands, when Cargill has been carrying out their work of moving cars? A. Yes, I have.

Q. And when Cargill has been doing their work you are out on the tracks and observe them doing their work, I will ask you at any time when you were present as stated, the railroad crews, engineers, switchmen, were [161] switching boxcars in the area where they could observe what was

going on?

Mr. Dallas: That is objected to, Your Honor, as immaterial. In other words there isn't any question what these men may have known, they were moving cars around with the winch, but whether they knew they were uncoupled after they uncoupled them, things of that kind, that is vague. The question is not sufficiently specific to be material.

The Court: Overruled, he may answer.

A. Yes, I think so.

We sometimes cover up a hole in the boxcar if it won't hold meal, but if something is wrong with the equipment, such as brakes, couplers, that is taken care of by a certain person from the Crandic Railroad. Cargill does not own any switch engines. To my knowledge no Cargill employees work on the tracks, as far as repairs are concerned. Since 1952, when the tracks have been repaired, they use track levels, [162] hammers, spikes and ties. Cargill does not own any such equipment. The crew that was putting the ties in brought the ties to the track, and I can identify who took care of the repairs by the truck that came down. It has a Crandic sign on the truck.

CROSS EXAMINATION

Nobody worked down at the scale permanently and there was nobody down in that vicinity where the scale was that night at the time of the accident. We weren't even trying to weigh. We were just moving the cars this way and bringing in the next car to load. The only people that would have been around the vicinity of this car would be the people in the plant working up where Crane and Harris were.

The movement of cars on the meal house track between the loading dock and the elevator was entirely a Cargill operation.

That evening Mr. Harris and Mr. Crane were employees

of Cargill who were under my immediate supervision and charge. The railroad had nothing to do with what they did and the [163] railroad did not have any right to direct or control their activities.

REDIRECT EXAMINATION

On this particular morning I did not communicate with Mr. Harris to my knowledge, or Mr. Crane, that there were no beans to be loaded down there. On this particular morning I did not communicate to either Mr. Crane or Mr. Harris that any men were to unload beans out of a car or not out of a car.

The inspection of the cars that Cargill makes is to see whether the cars will hold the meal, such as if there were a hole in the floor. No one connected with Cargill is assigned to inspect the equipment on cars such as brakes, couplers, and other equipment.

PLAINTIFF'S INTERROGATORY NO. 5 AND DEFENDANT'S ANSWER THERETO READ INTO RECORD.

Mr. Halloran: All right. Said Interrogatory No. 5 reads as follows: "In relation to the empty boxcars set out by the defendant on a spur of track servicing the elevator of Cargill, [164] Incorporated as alleged in Count I, Paragraph 2 of the petition and as admitted by the defendant in its answer, state the following: "Paragraph A. The number of boxcars so set out in said string of cars."

And inasmuch as the answer to A there, our questions ran A through G, inclusive, and the answer incorporates all in one, I will read all of the sub-paragraphs.

Paragraph B of this interrogatory.

"B. The date of said delivery?

"C. The time of said delivery?

"D. The ownership, type of cars and serial or identification number of each car in said string of cars.

"E. State the relative positions of said cars by serial or identification numbers commencing with the number of the car closest to the Cargill, [165] Incorporated scale referred to in Paragraph 4 of Count I of Plaintiff's Amended Petition.

"F. State the name, address, occupation and place of employment of every train or switching crew member who is engaged in the delivery of said cars to said spur track.

"G. Referring to the removal of said cars as stated in Division Three, Paragraph 5 of Defendant's Answer filed July 28, 1965 state the date and time of said removal, and the names, and addresses, occupations, and places of employment of all persons engaged in said removal."

The answer to those questions as admitted by the defendant is as follows:

"By way of answer to Interrogatory No. 5 and the various subdivisions A through G, inclusive, defendant states the following: On March 20th, 1963, the defendant delivered and set out on the tracks servicing the elevator of [166] Cargill, Incorporated, which track is east of the Cargill plant, a total of six empty boxcars on March 20th, 1963. These boxcars were delivered and set out on this track at different times on that date as hereinafter more specifically stated. B and C at approximately 7:30 a.m. on March 20th, 1963, three of these cars were set out. Between 7:30 a.m. and 8:30 p.m. on March 20th, 1963, the remaining three cars were set out. D and E, all of the six cars were boxcars. The ownership and serial or identification of each of said cars was as follows, and the relative positions in which said cars were set in with the first of said cars so set in, being closest to the Cargill scale were as follows: One, C.B.&Q., No. 34330; Two, Southern, No. 22114; Three, C.B.&Q., No. 31372; Four,

Union Pacific, No. 18742; Five, Minneapolis and St. Louis, No. 53694; Six, Northern Pacific, No. 29425."

[167] CLARENCE WILLIAM BOHLANDER,
being duly sworn, testified on behalf of the plaintiff as follows:

DIRECT EXAMINATION

My name is Clarence William Bohlander and I live in Marion, Iowa. Presently, and in March of 1963, I was employed by Cargill, Inc. My title is plant manager. In response to subpoena I brought with me certain bills of lading with reference to cars that were loaded at Cargill on March 21, 1963.

(Plaintiff's Exhibits 42, 43, 44 and 45 offered and received into evidence.)

Said copies are true and correct and show the particular car number, the contents and the consignee of each of those cars.

CROSS EXAMINATION

Each bill of lading was issued by a railroad other than Crandic.

[168] REDIRECT EXAMINATION

The cars referred to in the bills of lading were brought to Cargill by Crandic and taken from our plant by Crandic.

RECROSS EXAMINATION

Q. In other words each and every one of these cars, you were issued these bills of lading by the railroads whose names appear on them and they accepted delivery of these cars in the City of Cedar Rapids, is that correct?

Mr. Halloran: If he knows.

Mr. Dallas: That's right.

A. That's correct.

RECORD DISCUSSION

Mr. Bohlander did not bring with him the bills of lading for cars Minneapolis-St. Louis No. 53694 and Northern Pacific No. 29425. Arrangements made for said witness to bring said bills of lading.

[169] RECORD DISCUSSION

Mr. Halloran: If the Court please, at this time I would like the privilege of reading to the jury and making a part of the evidence of this case, Paragraph No. 9 of the Court's pre-trial order in this case, January 10, 1967.

The Court: You may proceed.

Mr. Halloran: Members of the Jury, it is stipulated in the pre-trial order between counsel for both parties and it was agreed, that the mortality tables, that they show a man of 26 years of age has an expectancy of life of 45 years.

* * * * *

The plaintiff rests.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Dallas: Comes now the defendant, Cedar Rapids and Iowa City Railway Company, and at the close of plaintiff's evidence [170] and after plaintiff has rested moves the Court as follows:

The defendant omits all those portions of its Motion for

Directed Verdict which related to Count I and Count III of plaintiff's petition and sets forth hereafter only those grounds of its motion which were specifically directed to Count II, and which were as follows:

Defendant now moves the Court to dismiss Count II of plaintiff's petition as last amended and direct the jury to return a verdict in favor of the defendant on said Count II of the last amendment for the following reasons:

1. Said Count II is predicated entirely upon the alleged violation by the defendant of the provisions of Section 2, Title 45, U.S.C.A., which is generally referred to as the automatic coupling statute.

2. No facts are alleged to show that at the time of the occurrence any of the cars in question—

[171] The Court: You say no facts are alleged or proven?

Mr. Dallas: No, proven, that no facts are proven which show that said cars at the time of the occurrence were then being actually used on defendant's interstate railway line by the defendant. That no facts are alleged which show that any of said cars were being used on defendant's interstate railroad line with the permission of the defendant at the time it is claimed such cars were not equipped with couplers which failed to couple automatically upon impact. That the petition of the plaintiff further fails to state a claim against the defendant upon an alleged violation of Title 45, Section 2, of U.S.C.A. for all of the grounds and for all of the reasons enumerated in Division 7 of defendant's amendment and supplemental answer which was filed subsequent to the pre-trial conference.

The Court: And subsequent to the last amendment—no—

[172] Mr. Dallas: Yes, that relates to that. Have you had a chance to see it?

The Court: Yes, go ahead.

Mr. Dallas: And the defendant now reiterates in its motion for a directed verdict all of the grounds and reasons enumerated in paragraphs 1 to 8, both inclusive, of said Division 7 which is entitled Second Separate Defense to Count II of plaintiff's amendment and substitute petition as amended in accordance with the pre-trial conference held on January 6, 1967.

3. Defendant further states and moves the Court to direct the Jury to return the verdict in favor of the defendant for the reason that even if the petition were construed to allege those essentials that nevertheless the evidence when viewed in the light most favorable to the plaintiff would not support those allegations or those elements which are enumerated in paragraphs 1 to 8, both inclusive, of Division 7 of defendant's amendment and supplemental [173] answer. Said paragraph 7 being enumerated Second Separate Defense to Count I of plaintiff's amended and substituted petition as amended in accordance with the pre-trial conference held on January 6, 1967.

4. Defendant further moves the Court to direct a verdict in favor of the plaintiff for the reason that there is a complete failure to prove that at the time that Car 2 was brought back from weighing and was claimed to have been brought into impact with Car 3 that the couplers on the Car 3 were then in a completely open position and in a position required to couple.

5. That it affirmatively appears that the coupler on the south end of Car No. 2 was completely closed.

6. That it affirmatively appears in the evidence that such attempted recoupling was attempted at a place where there is a curvature in the track and that under such circumstances a perfect coupler would not be [174] required to couple automatically upon impact, and under such cir-

cumstances there could be no breach of duty on the part of the defendant unless it was affirmatively shown, which it is not, that coupler on Car No. 2 was opened or at least partially opened and that the coupler on the north end of Car No. 3 was also open so that the full maximum coupling capacity which was available by proper use and manipulation of the cars by means of the pin lifter levers would have, if utilized, would not have resulted in a coupling automatically upon impact. That the evidence affirmatively shows by the plaintiff's own evidence that such a coupling cannot be made and there is no requirement that it should be made when attempted upon a curve. That it affirmatively appears from the evidence that at the time Car No. 2 was uncoupled from Car No. 3 that such uncoupling was made after the couplers had functioned to the extent of moving the cars and that the couplers were then functioning and continued to function until they were released by the [175] purposeful act of Mr. Harris in lifting upon the pin lifter lever and that they did properly couple.

So it affirmatively appears that at that time the cars were equipped with couplers which in all respects were in compliance with Section 2 of Title 45 U.S.C.A.

7. That there is no evidence in this record which viewed in the light most favorable to the plaintiff which show that the couplers were brought together at a time when both the coupler on Car No. 2 and Car No. 3 were in a position, open position required to enable cars to couple automatically upon impact, and on the contrary it affirmatively appears that both couplers were not so open. And there is no evidence which would permit the Jury to find other than by mere speculation and guess that the coupler on Car No. 3 was more than partially open.

9. Defendant further moves the Court to direct a verdict on [176] Count No. II of plaintiff's petition for the rea-

son plaintiff has failed to establish his freedom from contributory negligence. In this connection the defendant enumerates all of the grounds and reasons in connection with contributory negligence as there set forth in his motion directed to Count I of plaintiff's petition without repetition thereof.

10. Defendant moves to dismiss Count III, or Count II of the petition, for the reason that the plaintiff has failed to show that the failure to equip the cars was a proximate cause of his injury, and by equip the cars, I mean equip them with automatic couplers as required by Section 2 of Title 45 U.S.C.A.

Defendant further moves the Court to dismiss and withdraw from the consideration of the Jury Count II of plaintiff's petition for the reason that if the Jury were to return a verdict in favor of the plaintiff upon Count II it would be based upon mere speculation and guess, not [177] supported by adequate evidence, and it would be the duty of the Court to set such verdict aside.

Defendant further moves the Court to direct a verdict on Count II, of plaintiff's petition * * * for the reason that under the evidence that if the defendant, rather than Cargill, were in charge of the cars at the time of plaintiff's injury, the plaintiff would be required to prove that he had the consent of the defendant to get up on the car of the defendant while the same was in motion. The absence of such consent would make the plaintiff guilty of a misdemeanor under Section 716.19 in the Iowa Code. Such violation of statute would constitute contributory negligence as a matter of law.

The Court: You mean even in an emergency you can't climb up to set the brake on a car while rolling away? If there is any such law I am not going to buy it. They can reverse me.

[178] Mr. Dallas: I merely wanted to have that in my—

(Friday, January 27, 1967.)

(The following took place in the Court's chambers:)

The Court: After argument of counsel it is hereby ordered and decreed as follows:

1. That defendant Cedar Rapids and Iowa City Railway Company's motion to dismiss Count I of plaintiff's petition is sustained on all grounds, to which plaintiff is granted an exception.

2. That defendant Cedar Rapids and Iowa City Railway Company's motion to dismiss Count III of plaintiff's petition is sustained on all grounds to which plaintiff is granted an exception.

3. That defendant Cedar Rapids and Iowa City Railway Company's motion to dismiss Count II of plaintiff's petition is overruled on all grounds, to which defendant is granted an [179] exception.

* * * * *

(Page 182, line 1, to page 234, line 26:)

[182] The Court: Now this is the time, the plaintiff having rested, the time has arrived as set by the pre-trial order for the submission of requested instructions.

The Court: Do you have your instructions?

Mr. Halloran: Yes, let the record show the plaintiff has at this time submitted to the Court plaintiff's requested instructions Nos. 1 through 15, inclusive, and at the same time handed one copy to Mr. Dallas as counsel for the defendant. And I believe it is understood by the pre-trial order in the event further evidence in this case—further instructions not anticipated at this time, the Court would consider allowing counsel to so submit.

The Court: Right. They have requested sudden emergency.

Mr. Dallas: Their request No. 11 looks like it might be in accordance with the approved [183] instruction.

The Court: Is this 5.4 verbatim?

Mr. Alfveby: I believe so, Your Honor, but I would have to look.

The Court: Well, never mind. I thought you might know.

Mr. Alfveby: Your Honor, for the record the plaintiff would like to state its emergency requested instruction is submitted only because of the Court's prior ruling that contributory negligence is involved in the case. That as to Count II it has been and is plaintiff's position throughout this trial that it is absolute liability if the violation is shown.

The Court: And the Court agrees with you, it is absolute liability and differs with you on the definition of absolute liability.

[184] The plaintiff's requested instruction No. 11, which was given by the Court as instruction No. 10, reads as follows:

"When one is confronted with a sudden emergency, not brought about by his own fault, and because there of is required to act upon the impulse of the moment without sufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as would be required of him if he had time for deliberation. Under such circumstances he is required to act only as an ordinarily, careful and prudent person would act when suddenly placed in a similar position, and if he so acts he is not liable for injury or damage resulting from his conduct."

(Friday, January 27, 1967, 9:30 A.M.)

The Court: Defendant's first witness.

Mr. Dallas: Mr. L. A. [185] Martin, please.

L. A. MARTIN,

being duly sworn, on behalf of the defendant testified as follows:

DIRECT EXAMINATION

My name is L. A. Martin and I reside near Iowa City. I am a switchman for the Cedar Rapids and Iowa City Railway, and have been so employed for 23 years. The duties of a switchman are to couple and uncouple cars and set hand brakes, spot cars, in general the movement of railroad cars.

Q. And do you have any idea as to how many cars you might couple and uncouple in the normal average day? Just an estimate, if you know. A. Oh, I would say probably—possibly 50 to 60 cars.

Q. And that is done under many diverse circumstances, is it? A. Yes.

Q. Sometimes on straight tracks, [186] is that correct?

A. Yes.

Q. Sometimes on curves? A. Yes.

Mr. Alfveby: Objection, leading, Your Honor.

The Court: I think it is preliminary.

Q. And have you observed occurrences as to what the speed and relevant circumstances in determining whether cars will couple when brought together on impact?

Mr. Alfveby: Same objection, Your Honor.

The Court: Overruled.

A. Yes.

Q. Now, let's assume you have a situation where you have a railroad car standing on a track, and let's assume that that railroad boxcar is a standard railroad boxcar, and assume [187] that that railroad boxcar is equipped with an automatic coupler which is in full compliance with the Federal Safety Appliance Act, assume that that car is sitting on that straight track, and assume that the coupler knuckle is com-

pletely open on that car, now let's assume also that there is another car that is desired to be coupled to this one sitting in the position described, and assume that it is moved by means of a locomotive and hooked in the usual and ordinary way for coupling, but assume that that car has the knuckle completely closed, now do you have the general factual background as I have explained it to you? A. Yes.

Q. Now, let's assume that this car with a closed knuckle is moved at a rate of perhaps approximately two miles an hour and is brought into impact at that rate of speed with this car that is sitting on a perfectly straight track with the one knuckle completely open, now have you observed instances of that kind [188] in your experience? A. Yes.

Q. And tell the jury what your observations have been, your personal observations as to the likelihood or certainty of those two cars coupling under those circumstances as described?

Mr. Alfveby: Objection, Your Honor, in this respect. Foundation is deficient as regards the two miles per hour.

Q. Let's assume it is a rate of two miles per hour exactly.

Mr. Alfveby: There is no evidence in the case, Your Honor—

The Court: Sustained.

Mr. Dallas: Your Honor, we are going to get into problems here and that is where we get into these other tests here of the speed that this winch propels here, if it is a problem of foundation.

The Court: Do you propose [189] to tie it in?

Mr. Dallas: Yes, I am going to have evidence to show the exact rate of speed this winch moves the car.

The Court: Very well.

Mr. Dallas: If I fail on that I will ask they be stricken, my interrogatories out, and properly so.

The Court: Very well, it will be allowed subject to being tied in.

Mr. Dallas: That is what I propose to do.

The Court: Very well, you may answer.

Mr. Dallas: Read (the question back to Mr. Martin. He doesn't need the whole question. Do you recall the question now?

Witness: Yes, I think I do. The question was whether or not under those circumstances these cars would be coupled.

[190] Mr. Dallas: Certainly.

A. I would say that they would couple.

Q. Probably or certainly? A. I would say probably.

Q. Now, assume that you increase the rate of speed of this approaching car with a closed knuckle to three miles an hour, would you say that that would increase the probability or not affect or change the probability of a coupling resulting? A. I would say that it wouldn't change the situation.

Q. Beg your pardon? A. I would say it wouldn't change the situation.

Q. In other words you would say a difference between two miles an hour and three miles an hour would not be unlikely to produce a greater uncertainty of coupling from your observations? A. I don't believe so. It might.

[191] Q. Well, what is the ordinary desired rate of speed of the moving car to get the most certain possibility of a coupling under circumstances such as I have described as you have observed them? A. I would say two to four miles an hour.

Q. Two to four miles an hour. Well, let's assume that you get down below two miles an hour and are approaching a speed of say one and a fraction, slightly less than two, would that diminution under two be a circumstance you have observed?

Mr. Halloran: If the Court please, further object to this

there is no evidence whatsoever this car is going one and a half miles an hour, less than two.

Mr. Dallas: We will have that evidence.

The Court: Subject to being tied up it is permitted. Overruled.

[192] A. I would say that at a lower speed the chances of affecting a coupling would be less.

Q. And based on your personal observation of actual instances that you observed would you say that, oh, as your speed decreases beneath two miles an hour that correspondingly the likelihood of coupling would be decreased too?

Mr. Alfveby: Objection, leading, Your Honor.

Mr. Dallas: It may be leading in that form.

The Court: Let me hear the question again.

Mr. Dallas: Maybe I can rephrase it.

The Court: Do you withdraw it?

Mr. Dallas: I will withdraw it.

Q. Mr. Martin, I want you to base your answer on the instances which you have personally [193] observed as to what the effect of the certainty or uncertainty of coupling may be when the speed of the moving car with the closed coupler is less than two miles an hour? A. The chances of affecting a coupling are less at lower the speed.

Q. So if you have got the lower below the two miles an hour the less likelihood of coupling, is that correct?

A. That's right.

Q. Now, tell the jury why that is? A. Well, I am not sure that I can. Apparently—

Mr. Alfveby: Objection, Your Honor, we object to any further response on the basis of what the witness has already said.

The Court: He may complete his answer.

A. I know from experience that it takes an impact or a

jar to [194] cause the pin to fall when the knuckle closes, and I am not sure why that is necessary.

Q. In other words your answers are given on the basis of results as you have observed them rather than the mechanical reasons why, is that correct? A. That's right.

After manipulation of the pin lift lever, which releases the lock block and the knuckle or drawbar, permitting the two cars to become uncoupled, the pin stays up or in an unlocked position. If two cars are proceeding on a straight track, coupled together, and the pin lift lever is lifted, the cars will not necessarily separate unless there is some force to slow one of the cars down. When they do separate on a straight track, the knuckle on the hind car would be completely open. With the same movement, except on a slight curvature, upon separation the knuckle could be only partially open, however, it would have to be almost completely open. If you brought the cars which were separated back and [195] attempted to recouple those cars while they were situated on said curve they possibly might not recouple. If the cars didn't couple on impact, I would pull the cars apart and possibly open the knuckle on the approaching car. This might increase the possibility of effecting a coupling.

Q. Now, suppose that you have a situation where you have—I call your attention now to what has been marked Defendant's Exhibit 19 which appears to be a photograph of the area in which has been generally referred to here as the meal house track. I am going to ask you to assume that this car which is situated underneath the platform there with the open door, let's refer to it as Car. No. 1, for our convenience and discussion, and this car that is labeled C. & N.W., let's refer to it as Car No. 2, and this car with an E on the end of it as Car No. 3, now does that identify the cars for convenience so you understand what we are talking about?

[196] A. Yes.

Q. Now, let's assume that those cars are situated in that position and I am going to show you Defendant's Exhibit 15 which appears to be the same area here, and this car here, the first one in the picture, this one C and O 1464 would be in approximately the same position as this car we referred to as Car No. 1, and then you see the other car down the track there. Now I am going to also call your attention to a view of that same track which shows the curvature of the track, and this is, oh, Plaintiff's Exhibit No. 2, and let's assume that this attempted coupling between Car No. 3 and Car No. 2 is effected while the—these cars were situated in the position where, oh, they would be on this curve, and assume that that attempted coupling was attempted by means of this winch which you see in front of the loading dock on the photograph, Exhibit 2, and assume that the cars were pulled up into that [197] position by means of that winch from the northerly direction, which would be looking towards what has been described here as an elevator shed, and assume that they are brought in contact on that curve by means of that winch, now does that photograph enable you to tell which is the inside of the curve and which is the outside of the curve? A. I believe so.

Q. Now, assume that you have a situation like that, and let's assume that you have a, oh, coupler on Car No., oh, 2, let's assume just for hypothetical purposes you have the coupler on Car No. 2 completely open and Car No. 3 completely open, and the coupler on Car No. 2 completely closed and assume that these cars are brought together by means of this winch at a speed of less than two miles per hour, in other words let's assume for the purpose that it is exactly two miles per hour, now what would you say as to whether under those circumstances assuming the couplers to be [198] in the position as I have described them, assuming that the cars—Car No. 2 was proceeding at the rate of two miles an

hour followed by Car No. 1, and assume that Car No. 3 was stopped with the brake set and there were two cars behind it, now do you understand the factual situation as I proposed it to you? A. I think I do, yes.

Q. Now, assuming the accuracy of all of those facts as they have been enumerated, based on your observations and many years experience as a switchman, do you have an opinion as to whether there would be a certain coupling, a possible coupling, or what is your opinion?

Mr. Alfveby: Objection, Your Honor, on the grounds that under the present state of the pleadings no answer that the witness could give is material and that the test is whether the couplers functioned at the time involved in this accident.

Mr. Leff: And for the [199] further reason it invades the province of the jury and it is a demonstrative set-up of photographs of other cars and does not contain all of the circumstances that were in the facts of the case, and it is calling for opinion of this witness as to the string of cars and circumstances shown in that photograph and asks his opinion on an exact question to be submitted to the jury, that situation purely demonstrative and would be hearsay.

Mr. Halloran: And speculative.

The Court: You also intend to tie in the speed proposition?

Mr. Dallas: I certainly do. If I fail on my speed—these other circumstances I feel are established without contradiction, the location of the cars.

The Court: The question as I recall it was not directed to whether the specific cars shown in the photograph—

Mr. Dallas: That's right, [200] cars like that situated in that location.

The Court: You may answer.

Witness: Will you please repeat the last part of the question?

Mr. Dallas: You have the reporter read back whatever is necessary to understand the thing. If you need more facts—

Witness: I believe you asked whether I would assume there would be a possible coupling or a probable coupling, or what was the other?

Mr. Dallas: Or unlikely coupling. In other words, certain, probable, or unlikely.

Mr. Halloran: Well, if the Court please, in view of the last three questions, I would make the further—

Mr. Dallas: Well, now—excuse me.

The Court: Go ahead, Mr. [201] Halloran.

Mr. Halloran: With reference to the characterization possibly, likely, or unlikely, the question is—the whole question is whether they would function or not function and it isn't a question of likely, unlikely, possible, or nearly possible. It is an improper question.

The Court: Overruled. He may answer.

A. I would say that it would be unlikely that they would couple.

Mr. Leff: I move to strike the answer for all the reasons urged in the objection.

The Court: Overruled.

Further assuming that I came up to two cars where the knuckles appeared to be closed but the pin had not dropped, the only way to recouple those cars would be to pull them apart and push them together again. Assuming this took place on the curve, such as in Exhibit 2, the usual and ordinary [202] way of doing this—from my experience in coupling cars on a curve, if the knuckle that opens toward the inside of the curve is opened, it is less apt to couple or make a coupling than if it were closed and the one was open toward the outside of the curve. The outside of the

curve in this picture is the side of the curve that is adjacent to the meal house. With respect to the pin lifter on that car, I try to have the knuckle that opens toward the outside of the curve open and the one that opens toward the inside of the curve closed. This would be the most desirable way of making a coupling.

It is possible to make a coupling by opening up both knuckles on both cars, but sometimes the knuckle that is open towards the inside of the curve will not be pushed far enough closed to make the pin drop.

The chances of effecting a coupling by moving one car with a car jack is very poor.

Q. I want to ask you to just give me a yes or no answer to this preliminary question I asked [203] you. Is there a usual and customary method which is employed to ascertain whether the railroad cars which are intended to be moved are in fact coupled together? Just answer that yes or no.

A. Yes.

Q. And what is the usual ordinary method of so ascertaining? A. By visual inspection, or by having the engineer pull or stretch the cars.

Looking at Defendant's Exhibit 17, it has an overhead pin lifter, which is a common type. The knuckle appears to be closed.

Q. Now, would you rely on that? Would those that are customarily—would the usual and customary method be to rely on the closed knuckle as its sole test as to whether it was in fact coupled or not? A. No.

Mr. Halloran: Object to this as immaterial, no foundation, [204] assuming facts not in evidence, no relation to the issues in this case.

The Court: Overruled.

Q. What would those persons usually and customarily engaged in that kind of work, what observations would they make of that coupler which is shown in Exhibit 17 to ascertain whether it was securely coupled or not? A. The pin is definitely not down. It wouldn't be coupled.

One accustomed in engaging in the work of moving cars, coupling and uncoupling, by looking at Defendant's Exhibit 23, it would indicate that the pin is dropped and that it was a secure coupling. By looking at Defendant's Exhibit 26, one who is usually and customarily engaged in the work of coupling and uncoupling cars would see that the knuckle is closed but the pin hasn't dropped. Exhibit 26 depicts an underslung type coupler. Defendant's Exhibit 25, to someone accustomed to doing the work of coupling and uncoupling cars, would indicate that the [205] knuckle is closed and the pin has dropped. I have written "pin not dropped" on Exhibit 26. This means that the knuckle is closed but the coupling is not securely made because the pin has not dropped. I have written on Defendant's Exhibit 25 the words "pin has dropped."

(From this point in the record Mr. Martin's testimony was explained, in part, by use of and demonstration with a drawbar from a railroad car with an underslung coupler in front of it. Said equipment was not identified as an exhibit, not received in evidence, and did not go to the jury.)

This object is a drawbar from a railroad car, with a coupler in front of it, the coupler having an underslung pin. The coupler and drawbar are the same as shown in Defendant's Exhibit 26, except the length of the pin lifter lever is shorter.

If two cars were being uncoupled while traversing a curve the knuckle would be in a position (demonstrating) like this, that is, it would not be completely opened. It would be completely opened if [206] you were uncoupling on a

straight track but not completely open on a curve because the drawbar on the car that was being uncoupled would be at a slight angle to this one. That is to accommodate for the curve * * *. In this demonstration, I positioned the knuckle in a less open position than that shown on Exhibit 22. A coupling would be unlikely between this demonstration and the coupler shown in Exhibit 22.

When you have a normally functioning coupler and you lift up on the pin lifter as far as it will go, it opens the knuckle sufficiently far to permit a coupling. You can't close a coupler by manipulating the pin lifter lever. Uncoupling two moving cars on a curve results in the knuckle being partially open.

Q. Now if you were coming up to a situation like this, let's get this around here in position so the Jury can see—now you have observed the position, and take a look at the lock block on the inside there. Now, is there any way if you came up and observed that it would—would the lock [207] block be in the position such as you have indicated on Exhibit 18? A. Yes.

Q. And assume that you came up and you wanted to move, oh, this car along with the car ahead of it, what inspection or observation—I'm not asking you what you would do, but someone accustomed to moving cars, what inspection or observation you would make before you started to move this string of cars? A. Look to see that the pin was dropped, or had dropped.

Q. Now, you tell the Jury exactly what you would look for here. What you could see. You are not looking on the inside because you have got— A. I would look for the mechanism down here to be in a lower position.

Q. In other words, by looking at that from the outside as you have indicated, what does that indicate to you in the

position that you have observed it there? [208] A. That the pin hasn't dropped.

Q. And that is the position you look on the inside—can you verify that? A. Yes.

Q. Now, assume—what would you have to have? What would you have to see there in order to—for somebody who is accustomed to moving cars to know that you had a firm coupling? Now, illustrate to the Jury how that would appear. A. I will have to drop the pin.

Q. All right, okay. A. There is about two to two and a half inches of travel on this pin from this joint to the bottom of the drawbar.

Q. And a person accustomed to moving cars, that would be something he would look for, is that correct? A. Yes.

It is the closed knuckle of the [209] preceding car, pulling away from the operated pin lifted coupler, which opens the knuckle.

CROSS EXAMINATION

It is true that to couple two cars on a straight track all that is necessary is to have the coupler on one car open and to bring the cars together with sufficient force to close the knuckle. I have told you before that there is a desired maximum speed with which cars should come together to make a coupling and that I say is two to four miles per hour. The maximum would probably be four miles per hour. I do not believe that there are a lot of circumstances with reference to making the coupling such as if one car is brought into another car that is standing and has a brake on it, or that the size of the string of cars with which contact is made enters into the situation with reference to the contact that is made by the moving car making the coupling. Neither do I agree that all that is really necessary is to have sufficient force to close the knuckle. I say that it takes rather a jarring impact

to close the knuckle and cause the [210] pin to fall.

In my demonstration here today I was able to close the knuckle with my hand without too much effort.

The knuckle will close on impact between two cars coming together with the same effort as I exerted on this knuckle a little while ago, but it is not true that with the knuckle closed the pin should drop. It is not a defective coupler if the pin does not drop and my explanation of the reason why is that in my estimation the knuckle can be pushed closed slowly and the pin will not drop under some circumstances.

In demonstrating with the coupler here regarding what position the knuckle would be in on a curve, I was talking about any curve. But the position of the knuckle on a curve would depend on whether I was on the inside of the curve or the outside of the curve, and the degree of the curve makes a difference. On a real sharp curve sometimes it is impossible to make a coupling. In demonstrating to the jury the position of the knuckle when a car was uncoupled on a [211] curve, I was not trying to say that that would be the position on every type of curve. The position of the knuckle of anything less than completely open would depend on the degree of the curve. Assuming the knuckle opened sufficiently to release the car and assuming that the car remained in the exact same position and on the same curve and that no change was made, and that the cars were brought back together, the other knuckle would fit in just exactly the same way it came out. I have never measured the curve at the meal house track. I don't believe I have ever attempted to make a coupling on that particular track and curve. Looking at the photographs of the meal house track curve it is not an unusual curve.

I have made all kinds of switching operations on tracks with curves on them like that and have made couplings and uncouplings on curves like that. It is not right to say, how-

ever, that I had no difficulty in doing it when the couplers were working right. My explanation is that I find from experience on making couplings on a curve of that type shown on the photographs of the meal house track, [212] that sometimes the couplers will not couple if the knuckle that opens to the inside is open and the other one closed. You will have better luck making a joint if the knuckle that swings to the inside of the curve is closed and the knuckle that swings to the outside of the curve is open. I am not telling you that from just viewing this photograph, but I am telling you that from my experience in making couplings on curves, any curve at all, whether it be minor or greater. It is not correct that the only difficulty in making a coupling on a curve is by reason of uncoupling a car on a curve that on occasions the knuckle will not open all the way. That is not what I am telling you. That is not the reason for the coupling not being able to recouple. The reason from my experience for couplings not making under those circumstances, I think I could point out to you if I was over to this drawbar here in the court room upon which I have been making these demonstrations before the Jury. My explanation to you is that, from my experience, having the knuckle open that is towards the inside of the curve, and the other one closed, it [213] will sometimes fail. I think the reason for the failure of the cars to couple is that it is because it doesn't push this knuckle completely closed and your other knuckle strikes the drawbar, what I would call the face of the inside of the drawbar back here, and will push the car before it pushes your knuckle far enough closed to make the pin drop.

Q. And again, Mr. Martin, assuming in the set of facts I gave you sometime ago when you told us that if the cars came back that were taken north, and came back, I think

you told us that when the knuckles closed the coupling should have made.

Mr. Dallas: Now that is objected to.

Mr. Halloran: Unless it is incorrect. Do you want to object to it being an incorrect statement?

Mr. Dallas: No, not if you are going to add to it.

Q. (Continuing) When you told us this, I want to change and add [214] a few facts to it, and assuming this movement was made on an area where there was some sort of a curve as indicated on Plaintiff's Exhibit 2, and the joint was then made, let's get away from all of this partly opened and partly closed, let's just assume that the joint was made and the couplers did close, you see, do you follow me? A. Yes.

Q. And by that I am speaking of the knuckles closing.

A. Yes.

Q. The knuckles closed the whole way. Under those circumstances that coupling—under those circumstances if the coupler was working properly it would have coupled and locked, isn't that correct? A. I can't give you a yes or no answer on that, either.

Q. Do you understand the question? It was the same thing as before. I am saying it came together and [215] the knuckles closed with the same force I have told you before, the same impact, and my question is as to whether the coupling should have made, and by that I mean have locked.

A. You are speaking in terms of a straight track?

Q. No, I put the additional fact in that it was uncoupled on a track that was curved as we see it here, Plaintiff's Exhibit 2, and brought back together, understand under the same set of facts with the third car not having been moved at all and the contact made with the same situation as when they left each other, and at that point the knuckles completely closed. Now, I am asking you under those circumstances

isn't it true that that coupling should have made and stayed and locked? A. Well, my answer would be yes, that it should have.

Q. Yes. And my next question to you, Mr. Martin, is this. And assuming that it did just that, [216] assuming it did just that and locked and then the cars were moved northerly, and by that I mean an attempt to move the cars northerly by starting them up with a cable attached to the southerly end of the second to north car and when that was done the coupling between the second to the north car and the third to the north car, same ones we have spoken about that coupled before, became uncoupled, and without anyone operating the pin lever—

Mr. Dallas: Does that complete it?

Mr. Halloran: No.

Mr. Dallas: Go ahead.

Q. (Continuing) Now, I want to ask you if the cars became uncoupled at this time, I will ask you if that was a properly working coupler?

Mr. Dallas: Is that your complete question?

Mr. Halloran: Yes.

[217] Mr. Dallas: That interrogatory is objected to as it assumes facts not shown by this record in that it assumes these couplers came together and were locked when there is absolutely no evidence in this record that the lock block ever fell or anybody looked to see if it fell. It is assuming that you had a proper coupling and then a failure of a proper coupling to hold, and there is no basis in this evidence that would warrant any such finding.

The Court: Overruled. You may answer.

A. I would say if the couplers had closed and locked that it wouldn't be possible for the coupling to come apart without somebody having pulled the pin.

Q. And correlary to that, if they did it, was an inefficient coupler, wasn't it? A. I don't think I have ever seen a coupler that had been coupled together and locked that would come apart by itself, so I can't answer that question.

[218] There are different types of brakes on boxcars, ratchet, friction and staff brakes. They all work a little differently. Some you have to wind the brake wheel more and this takes more time.

REDIRECT EXAMINATION

Crandic does not either set out cars or remove cars on the meal house track between the meal house and the elevator. Loaded cars are taken out from north of the elevator. Empty cars are set out south of the meal house. The only way that the two cars being brought back from the north could have moved the cars back as much as five feet would have been if the winch had continued to operate.

CARL W. PETERSON,

being duly sworn, testified on behalf of the defendant as follows:

DIRECT EXAMINATION

My name is Carl W. Peterson. I am a civil engineer for the Iowa Light and Power Company. At the request of Mr. Dallas I prepared a plat of the general area shown in [219] Exhibit 13, the area which has been referred to as the meal house track on the east side of the Cargill plant in the City of Cedar Rapids, and particularly the area between the loading dock and the elevator shed.

(Defendant's Exhibit 46, a plat or drawing, offered and admitted into evidence subject to the provision that it does

not purport to show the elevations as of March 21, 1963, of those portions of the track which the evidence heretofore has shown has been changed.)

Exhibit 46 is the drawing which I prepared. I took the measurements which locate the tracks on December 2, 1964, and I put the elevations on the tracks from the loading dock to the elevator, on November 20, 1966. The top part of the plat correctly shows the track and the lineal distance between the various points indicated thereon. The lower part of the plat, the profile, indicates any variation in the grade. The zero point in elevation is at the northerlymost column or steel post that supports the shed over the loading dock indicated on Exhibit 13 as X-2. [220] That is zero, where the grade starts. I took the grade down to the south end of the scale, which is just inside the elevator shed indicated as X-3 on Exhibit 13. On the plat the lineal measurements are based on a scale of one inch per 20 feet, and the profile or elevations are based on a horizontal of one inch per one foot. I have not undertaken to show the degree of the curve in the meal house track shown on Plaintiff's Exhibit 6. On the plat the meal house track is designated E-1, the Nutrena track M-2 and the bean track as E-3.

CROSS EXAMINATION

It was 244 feet from the north edge of the meal house to the south end of the scale. It was 293 feet from the south end of the Nutrena building to the north end of the meal house. Regarding the elevations, I measured every twenty-five feet along the top of the east rail.

REDIRECT EXAMINATION

The difference in the elevation at the top of the rail at the north edge of the meal house dock and the south side of the elevator shed, [221] which is 244 feet distant, is a little less than three inches.

WILLIAM SCHNEIDER,

being first duly sworn, testified on behalf of the defendant as follows:

DIRECT EXAMINATION

My name is William Schneider and I live in Cedar Rapids, Iowa. I am presently the General Superintendent of the Cedar Rapids and Iowa City Railway and have held that position since August, 1951. Regarding the meal house track from 12th Avenue North to the elevator shed, I have requested a search to be made of the company records to ascertain the existence of a deed, written instrument conveying easement rights, or franchise of any kind and have found no papers. Neither I nor Crandic Railroad have ever claimed the right to direct or control the movement of any railroad cars in that area. We have no papers of any kind relating to ownership of the tracks.

From my own personal knowledge and observation the area from the [222] winch southward towards Twelfth Avenue, which would be the area in which it is claimed they were endeavoring to couple these cars, the grade is slightly upgrade towards the south. My knowledge based on my own personal observation is that we set empty cars out on the meal house track at the Cargill plant. These cars were set out on the south end of this meal house track and that is the end of the railroad's handling of these cars until Cargill

releases them to the railway again out on the track north of the elevator. I never saw nobody recouple a railroad car after it had been uncoupled down there, and nobody ever reported such an occurrence to me. If any of our train crew might at some time have gone by and seen people coupling cars, the members of that train crew had nothing to do with making arrangements with Cargill concerning what use should be made of the cars delivered there to Cargill:

I personally participated in making a test to determine the rate of speed at which the winch, which turns at a constant rate, revolves. It took approximately [223] 70 seconds to move the hook a distance of 50 feet, which is about one half mile per hour.

Exhibits 47 and 48 were offered and introduced in evidence which showed the condition of the weather in the City of Cedar Rapids as follows: Weather conditions at 6:00 A.M. on March 20, 1963, cloudy with temperature 33 degrees. At noon partly cloudy, 39 degrees. At 6:00 P.M., partly cloudy, 32 degrees. At midnight, clear, 29 degrees. Exhibit 28 showed the weather at 6:00 A.M. on March 21, 1963, was clear and 24 degrees. At noon, clear and 47 degrees. At 6:00 P.M. on March 21 clear and 37 degrees. At midnight clear and 26 degrees.

In the area shown on Exhibit 13, between the indications No. 1 and No. 2, the meal house track there had some alterations or changes down in the mud and Cargill was having difficulty pulling cars through there, and they asked us to raise the track out of that hole, which was done. We made some car movement tests there on December 17, 1966. The highest speed attained was 1.79 miles per hour, the cars being pulled by the winch.

[224] That was the highest speed which was attained at any point by any of those cars during the time it traveled between the meal house dock and the elevator shed.

CROSS EXAMINATION

Q. I believe Mr. Dallas asked you if you had made a search for, and if you had found, any papers or records indicating any ownership in the ties in the meal house track, is that correct? A. That's correct.

Q. And what was your response, sir? A. We found no record of our ownership in those ties.

The Crandic Railroad acquired their railroad from the Iowa Light and Power Company, in around 1949 and 1950. Regarding who maintains the meal house track from 12th Avenue to its juncture with other tracks at 8th Avenue, our people probably put ties in it occasionally, and I don't know if anyone else does. Since I started to work for Crandic in July of 1942, [225] I have never seen anyone other than Crandic or the Iowa Power Company Railroad, whatever the proper name for that was, maintain the tracks here involved. The meal house track joins, to the north, with our yard tracks. The meal house track is located east of Block 57, Young's 8th Addition. The tracks we are involved with here lie north of what is now 12th Avenue. The meal house track is located commencing at the south boundary of Lot 11, northward to the south end of the scale, Block 57, Young's 8th Addition. Including the two sets of tracks which service Cargill, there are probably five sets of track east of Block 57.

(Plaintiff's Exhibit 49, being an indenture dated December 31, 1949, conveying a railroad from the Iowa Electric Light and Power Company to Crandic, offered and admitted into evidence.)

Q. Crandic's office is about three blocks south of Cargill, is that correct? A. That's right.

Q. Is this office also the location [226] of your main operation's headquarters? A. That's correct.

Q. Is it possible to travel by rail from your office right north up to Cargill? A. Yes.

Q. Sir, on this track we have been calling the meal house track, it doesn't dead end, does it? A. No.

Q. It is a track which is continuous or at least leads into other tracks of yours, is that correct? A. I believe I stated the meal house track was considered to be between the elevator and Twelfth Avenue.

Q. Yes, well, without getting into semantics, what I mean is the track we have been calling the meal house track, you say at the meal house is called the meal house track, but whatever it is called, that track or set of tracks is continuous? [227] A. That's correct.

Q. From the south in the direction towards your office to the north by Eighth Avenue? A. That's correct.

Q. It leads into other tracks, is that correct? A. That's correct.

Q. You stated, sir, on direct examination, that you didn't claim that the meal house tracks from Twelfth Avenue to the meal house were in interstate commerce? A. That's correct.

Q. Do you have any personal knowledge as to the standards which determine whether something is or is not in interstate commerce? A. Yes, I think so.

Q. Well, then, let us assume that boxcars are brought in from states, well, from places outside of the State of Iowa, across [228] the Iowa state line, that these boxcars are brought in to you and interchanged to you for delivery to a consignee, that said cars belong to many different railroad companies, would you consider this to be interstate commerce? A. No.

Q. You would answer that, despite the fact that these cars came from across the state line? A. We don't know that they did.

Q. Let us assume, sir, that the weigh bills that you looked at when we were talking about the weights of various cars are correct and that the destinations listed on these weigh

bills, Portland, Oregon, and Portsford, British Columbia, Canada, Nampa, Idaho, and Coffeyville, Kansas, let us assume those destinations are correct, would you consider that those cars are in interstate commerce? A. I would not.

[229] Mr. Dallas: In other words, the question is, you don't pin him down as to when commerce commenced. Objected to as indefinite and not specific.

The Court: Overruled.

To the South of the meal house the meal house track is a continuous set of tracks which leads into other tracks going towards the Crandic office, three blocks south of Cargill.

(Plaintiff's Exhibit 50, being a plat of Block 57 of Young's 8th Addition, offered and admitted into evidence.)

I indicate on Exhibit 50 with a small circle next to my initials the southeast corner of Lot 11, Block 57, Young's 8th Addition. 11th Avenue on the plat is presently called or designated 12th Avenue. The meal house tracks lie east of Block 57 and west of Block 56, which is in an area on the plat designated 11th Street.

REDIRECT EXAMINATION

Lots 4 through 11 of Block 57 refer to the area on which the Nutrena track is located. I checked [230] with the Iowa Electric Light and Power Company and they claim they have no papers regarding these tracks.

There is no instance in which we have built over any right of way which is owned by Crandic where any canopies or sheds, or anything of that kind have been built over the track. We don't have any track which we own which may service an industry where a scale has been built on the right of way that the track passes over.

REBUTTAL TESTIMONY ON BEHALF OF PLAINTIFF

(Plaintiff's Exhibits 51, 52 and 53 marked for identification and offered into evidence. Ruling on admission deferred.)

RONALD CRANE,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Alfveby:

Q. Mr. Crane, do you recall having [231] your deposition taken on November 1st, 1966? A. Yes, sir.

Mr. Dallas: Objected to as irrelevant and immaterial, leading and suggestive, not proper rebuttal.

Q. Mr. Crane, referring to the early morning of March 21st, 1963, I believe you testified on direct examination that the Cars Nos. 1 and 2 took off quite rapidly, is that correct?

Mr. Dallas: Objected to as being very leading and suggestive and not proper rebuttal.

Mr. Alfveby: Your Honor, I am just trying to orient—

The Court: Proper as far as rebuttal is concerned. It is somewhat suggestive, but, he may answer. A. Yes.

Q. Could you tell us from your observation of the two cars on that particular night what speed, [232] in your opinion, they were going?

Mr. Dallas: Objected to as irrelevant and immaterial; not proper rebuttal.

The Court: Overruled.

A. The cars took off faster than I walk and seemed to be moving away pretty quickly.

Q. In your experience, Mr. Crane, have you had the opportunity to observe the movement of cars between the meal house and the elevator under various conditions? A. Yes.

Q. I will ask you, sir, if, in your experience, there are any factors which might or might not make a difference as to the

speed with which cars might move? A. Yes, there is.

Q. Could you tell us what these factors are? A. Well, it would all depend on [233] how long—if you just gave a slight pull with the winch to get them started, or if you just kept the winch taut for considerable distance, this would make a difference in the speed. Like we say, weather, and weight, and things of this nature which came in there are all factors, too.

Q. What effect, if any, did the speed of these cars, as you observed it, have on your conduct?

Mr. Dallas: Objected to as calling for the opinion and conclusion of the witness; mere speculation and guess; not proper rebuttal.

The Court: Sustained.

Q. Mr. Crane, were you in court when Mr. Martin testified? A. Yes.

Q. And he mentioned a number of different types of brakes, I believe. Have you had the opportunity to work with brakes which differ in any way? [234] A. Yes.

Mr. Dallas: Your Honor, that is objected to as entirely irrelevant and immaterial and not proper rebuttal, and no claim of any defect in any brake here.

The Court: Overruled.

A. Yes, I have.

Q. What has been your experience along this line?

Mr. Dallas: Same objection.

The Court: Overruled.

A. It varies on how fast you can get the cars stopped, the type of brake, not necessarily the type of brake, it's just some have got more slack in them than others.

(Page 238, line 14, to page 245, line 7:)

CROSS EXAMINATION

By Mr. Dallas:

Q. Mr. Crane, I call your attention to page 107 of your discovery deposition.

Mr. Halloran: What page, Mr. Dallas?

Mr. Dallas: 107, line 1. Have you got it spotted?

Mr. Alfveby: Yes, sir.

Q. And I ask you if you were not at that time asked this question: "How fast did they go in miles per hour?" That was the question. [239] A. That's correct.

Q. And your answer, "I wouldn't have the faintest idea how fast that was," your answer, is that correct? A. That's correct.

Q. That is true, then, and now isn't that true?

A. As far as miles per hour is concerned, yes.

Q. "Would they go less than two miles an hour?" And that was the question, is that right? A. Yes, that was the question.

Q. And your answer was, "I told you I don't know." That was your answer, is that correct? A. That's correct.

Mr. Dallas: That is all.

REDIRECT EXAMINATION

Mr. Alfveby: Mr. Dallas, page 106.

[240] Mr. Dallas: 106, what?

Mr. Alfveby: Line 4.

Mr. Dallas: Line what?

Mr. Alfveby: 4.

By Mr. Alfveby:

Q. Do you remember, Mr. Crane, the preceding page of what Mr. Dallas just asked you? I will ask you if you were not asked this question: "In other words, if you could have walked down there slowly and got on this car and gone up there and set this brake, why, there wouldn't have been any

danger at all, would there?" Were you asked this question?

Mr. Dallas: That is objected to as not proper rebuttal, not proper redirect examination, irrelevant and immaterial, calling for the conclusion of the witness.

Mr. Alfveby: If the Court please—

The Court: Pardon me, I [241] think it is a part of the deposition applicable to the subject matter, to the portion of the party's deposition that was put in evidence, and the objection will be overruled. Were you asked that question?

A. Yes, I was.

Q. And I will ask you if you answered the question as follows: "If I had walked there wouldn't have been the situation there was"? A. That's correct.

Q. And was the question then asked, "Pardon?" A. Yes.

Q. And I will ask you if this answer was given: "I said if I had been walking then the situation wouldn't have been there because I wouldn't have tried to stop those cars if there hadn't been a chance of somebody getting seriously injured."

Mr. Dallas: That is objected [242] to, Your Honor, as not being proper rebuttal. That answer was given starting with line 11.

The Court: The objection will be sustained and the Jury will be instructed to disregard it.

Mr. Alfveby: Referring to line 20.

The Court: Mr. Alfveby, is this confined exclusively to the witness' capability to estimate the speed of cars?

Mr. Alfveby: The witness' ability to estimate the speed of cars.

The Court: Very well.

Mr. Alfveby: Would the Court like to peruse the original on our desk, sir?

The Court: Where are you reading from?

Mr. Alfveby: Starting, then, Your Honor, with line 18, page 106.

[243] Mr. Halloran: Let the record show also these questions are being asked by Mr. Dallas on cross examination.

Mr. Alfveby: This question and answer immediately precedes the portion Mr. Dallas referred to on the top of page 107.

The Court: Do you have any objection?

Mr. Dallas: In other words, what he is reading may be so far as locationwise, but so far as subject matter is concerned it is certainly something entirely different, Your Honor.

The Court: Are you objecting to it?

Mr. Dallas: I do. It is not proper rebuttal. It is repetitions. It is a matter already gone into.

The Court: Be sustained.

Mr. Alfveby: If the Court please, it was my recollection that Mr. Dallas asked lines 1 and 2 on page 107.

[244] Mr. Dallas: That's right.

The Court: Yes.

Mr. Alfveby: And, as part of surrebuttal, plaintiff submits that lines 20 through 22 on 106 should give the context, Your Honor.

The Court: You may read those.

Mr. Dallas: I have no objection to 20-22. I haven't objected to those.

The Court: You may read those.

Q. Mr. Crane, I will ask you if you were asked this question at said deposition: "Question. That is right. In other words, these cars, they didn't move any faster than a walk, did they?" A. That's correct.

Q. Now, I will ask you, sir, if you gave, at that time, the following answer: "Answer. I would say they did, yes."?

[245] A. That's right.

Q. And it was true at the time you stated it and it is true now, isn't that right? A. Yes, sir.

(Page 249, line 32, to page 272, line 13:)

(Both parties having rested, defendant made a motion to dismiss Count II on the following grounds:)

[250] The Court: Do you want to add to your motion?

Mr. Dallas: Yes. Comes now the defendant, Cedar Rapids and Iowa City Railway Company, and at the close of all of the evidence and after both parties have rested, and moves the Court to direct a verdict in favor of the defendant and to dismiss Count 2 of plaintiff's Petition, which is the only count of the petition still remaining, upon all of the grounds and for all of the reasons asserted in defendant's motion for directed verdict as amended at the time of the close of plaintiff's case.

And defendant further adds thereto, for the further reason it now affirmatively appears without contradiction that this occurrence and the attempt to couple the cars took place on a curve and the evidence shows without dispute and without contradiction that in order to couple cars on a curve, in order for the couplers to be set in a position to couple it may be necessary to, oh, close [251] the coupler on the inside of the arc and open the coupler on—the knuckle of the coupler on the outside of the arc and the testimony of Mr. McGuire and the defendant's witnesses is to the same effect, if you have a coupling attempt with only one knuckle open and the other closed, and you are attempting to make a coupling on the curve, why the coupling that—the knuckle that should be open would be the knuckle on the outside rather than on the inside of the curve. Now, the evidence shows without dispute or contradiction here that, at the time these cars were uncoupled the uncoupling occurred by lifting up the pin lifter on the Car No. 3 which was on the inside of the curve. Nobody ever touched the pin lifter on Car No. 2, which would be on the outside of the curve which would be the necessary way to position those couplers in order to make a

coupling on the curve, either that way or have both couplers open, and there isn't any contention that anybody claims there was any attempt to reposition by means of the pin [252] lifter the coupler on Car No. 2.

Now, the next ground we say that the evidence shows without dispute is that the usual and ordinary rate of speed at which cars are brought together for the purpose of effecting a coupler would be at a distance, a speed of between two and four miles an hour. Now, viewing the plaintiff's evidence in the light most favorable to the plaintiff, Mr. McGuire said, and if I am correctly recalling his testimony, that cars could couple at a rate of speed as low as one mile an hour. Now the evidence shows without dispute and without contradiction that the speed of this winch is less than one mile per hour and that these cars were going up a slight incline, not large, but so there wasn't any case of rolling the cars or increasing the speed of the cars at impact above what the winch speed was which was less than one-half mile per hour. Now, there is absolutely no evidence in this record that would support the thing that the Court sets out here in his pre-trial order [253] requires that the cars to which it applies be equipped with couplers which will couple automatically by impact when set in an open position and will thereafter remain coupled until set free by some purposeful act of control and that the impact referred to is an impact of force equal to or greater than the impact normally employed by the railroad in coupling cars. Now, the impact ordinarily employed by railroads in coupling cars as a car is proceeding at a rate of two to four miles an hour, that is the normal rate. True, they might couple at less than two miles an hour, they might not, either. The fact they might not couple or might couple certainly we are not a guarantor of couplers that will couple on impact unless those cars are brought together as Your Honor says in paragraph 2 of the pre-trial

order with an impact or force equal to or greater than the impact normally employed by the railroad in coupling cars. The force of impact is from two to four miles an hour, that is the normal impact of railroad [254] cars. We say on the basis of that certainly the plaintiff has got the affirmative of the issue here. There is no evidence here whatsoever of any specific defect in any of these couplers and in order to have a substitute for that the plaintiff has got to show that these cars were brought together in the usual, normal, and ordinary way and they failed to couple on impact. Now what is this usual and ordinary way? In other words, we have got to have the couplers set in a way that it is required to be set in order to effect a coupling on impact. Now the evidence is without dispute that this attempted coupling occurred on a curve. Now the usual way to set couplers to effect a coupling on a curve is either do one or two things, either open up the coupler on Car No. 2 as well as the partial opening on Car No. 1, or else close the coupler on Car No. 3 and lift up on your lift pin and completely open the coupler on the outside of the curve. Now, that is, there isn't any evidence that would permit the jury to [255] find that, and that together with the setting the coupler, or the speed at impact are two essential elements that we say viewing plaintiff's evidence in the light most favorable to the plaintiff are just absolutely lacking.

The Court: Okay, the motion will be overruled. Let the record show at close of the evidence, both parties having rested, the Court is now handing to counsel copies of the Court's proposed instructions on the issues. In fact, it is the Court's whole instruction.

PETITIONER'S REQUESTED INSTRUCTIONS

(Filed with the Court January 27, 1967.)

Proposed Instruction No. 1

Plaintiff alleges that, at the time and place in question, the couplers on the railway cars involved were defective in this: that the couplers failed to couple properly upon impact, or, once coupled, the cars failed to remain coupled until set free by some purposeful act of [256] control. And plaintiff further alleges that his injuries and consequent damages resulted, in whole or in part, from this coupler failure.

You are instructed that Section 2 of the Federal Safety Appliance Act (45 U.S.C.A. Section 2) imposes upon the defendant an absolute duty to have all cars which it hauls or permits to be hauled or used on its line equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

This statute is violated when a coupler fails to function when operated with due care, in the normal, natural and usual manner, or when a coupler fails to function properly because of a particular defect.

If you find that plaintiff was injured and that said injuries resulted in whole or in part from the defendant's violation of this statute, plaintiff is entitled to recover damages for such injury regardless of the absence of negligence on the part of the defendant [257] railroad, and regardless of any negligence on the part of the plaintiff.

45 U.S.C.A., Section 2, and cases cited in I, Subsection C, and II of Plaintiff's Brief.

Proposed Instruction No. 3

You are further instructed that, under the law, the fact that the couplers functioned properly on other occasions is immaterial. The test is whether the couplers functioned properly on the occasion in question.

Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430, 70 S.Ct. 226 (1949).

Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96, 70 S.Ct. 509 (1949).

Proposed Instruction No. 4

You are further instructed that if you find that defendant has violated said coupler statute, the law does not require that the plaintiff's injuries be sustained while between the ends of the cars. If [258] you find that the violation is established, the plaintiff is entitled to recover damages for injuries which resulted, in whole or in part, from said violation.

Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430, 70 S.Ct. 226 (1949).

Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96, 70 S.Ct. 509 (1949).

O'Donnell v. Elgin, J. & E. Ry. Co., 338 U.S. 384, 70 S.Ct. 200 (1949).

PLAINTIFF'S OBJECTIONS TO INSTRUCTIONS TO JURY AND FAILURE TO GRANT PLAINTIFF'S REQUESTED INSTRUCTIONS

(Made on January 31, 1967, prior to Court's giving its Instructions.)

The Court: At this time, arguments of counsel having been completed, the Court now hands the final instructions to counsel by advising them that the final instructions are identical with the tentative instructions with the exceptions of Instruction Nos. 8 and [259] 11 which have been modified, and which the Court now hands to counsel as modified.

This is the time for the parties to make their exceptions and objections to the final instructions. Plaintiffs will go first.

Mr. Alfveby: If the Court please, at this time the plaintiff would object to Instruction No. 8 in the following respects.

That the instruction does not instruct the jury that the violation of the law here involved, the Federal Safety Appliance Act, results in absolute liability. That said Instruction 8 erroneously informs the jury that the violation of said law constitutes negligence.

Further plaintiff objects to the Court's Instruction No. 6 in the following particulars:

Proposition No. 1 states that the plaintiff must prove that defendant was negligent as alleged in the Petition. That it is plaintiff's position that plaintiff need only show that the defendant violated the Federal Safety Appliance [260] Act and that said violation resulted in whole or in part to plaintiff's injuries. Further, that any such violation would constitute absolute liability.

Plaintiff objects to Proposition No. 2 on the ground that it does not state the applicable law for one who is within the

class intended to be protected by the Federal Safety Appliance Act in the following particular:

That one within said class has a right to recover if the violation resulted in whole or in part to his injuries.

Regarding Proposition No. 3, plaintiff objects that contributory negligence is an issue in this case and that said Federal Safety Appliance Act entitles this plaintiff, this plaintiff being within the class, to all of the protections of the Act, that a violation of the same is absolute liability and that the jury should not be instructed on contributory negligence, nor should it be plaintiff's burden.

May the record show that the objections made just prior to this [261] sentence are incorporated by reference and made applicable to Instruction No. 5 as said instruction includes in its definitions ordinary care, negligence, contributory negligence, proximate cause.

Plaintiff objects to Instruction No. 9 in the following particular:

That part of said instruction which reads as follows: "You may, however, consider such evidence with respect to the prior subsequent efficient operation of the coupler, etc." down to the end of the instruction. It is plaintiff's position that said evidence is immaterial on all issues.

Plaintiff objects to the Court's Instruction No. 11, paragraph 4, line 1, which states as follows: "The measure of damages for loss of time," the plaintiff objects and requests the Court that the words "earning capacity" be substituted therefor. Plaintiff also objects on the same grounds wherever in said instruction the words loss of time as opposed to earning capacity are used.

[262] Plaintiff further objects to the Court's failure to grant its requested Instructions numbered 1 through 15, inclusive, with the exception of plaintiff's requested Instruction No. 11, which the Court has granted, but which was

submitted to the Court by the plaintiff in the alternative, it being plaintiff's position that reasonable care, negligence, and contributory negligence is not a part of the case.

INSTRUCTIONS TO THE JURY

(Given January 31, 1967.)

Instruction No. 8

The law provides that railway cars used by defendant be equipped with couplers which will always couple automatically by impact when set in the proper position and will thereafter always remain coupled until set free by some purposeful act of control. Failure to comply with this provision of law constitutes negligence.

The impact referred to in the foregoing paragraph is an impact equal to, or greater than, the [263] impact normally employed by the railroad in coupling cars.

For the purpose of this case, the railway cars on which plaintiff was working were being used by the defendant as part of its system.

In other words, the burden of proof is on plaintiff to establish each of the following:

A. That the couplers on the cars were set in a proper position to couple.

B. That, when the couplers were set in proper position, the cars were brought together with an impact equal to or greater than the impact normally employed by the railroad in coupling cars.

C. That when the cars were so brought together they either failed to couple or, having coupled, failed to remain coupled until set free by some purposeful act of control.

If plaintiff has sustained his burden of proof as to each of the foregoing subparagraphs A, B, and C, then he has estab-

lished defendant is guilty of negligence as [264] required by Proposition No. 1 of Instruction No. 5. But, if any one or more of said matters are not thus shown, then plaintiff will have failed to establish defendant is guilty of negligence.

Instruction No. 6

In order for the plaintiff to recover in this action, it is necessary for him to establish by a preponderance or the greater weight of the evidence all of the following matters, to-wit:

Proposition No. 1. That defendant was negligent as alleged in the Petition.

Proposition No. 2. That such negligence on the part of the defendant was a direct and proximate cause of the injuries and damages complained of by plaintiff.

Proposition No. 3. That plaintiff was free from contributory negligence.

Proposition No. 4. That plaintiff was damaged, and the amount thereof.

[265] If each and all of the above and foregoing matters are thus shown by a preponderance or greater weight of the evidence, then plaintiff is entitled to recover in some amount against the defendant. But if any one or more of said propositions are not thus shown, then the plaintiff is not entitled to recover from the defendant.

Instruction No. 5

When used in these instructions, the following words and phrases have the following meanings:

Ordinary care. Ordinary care means such care as an ordinary careful and prudent person would have exercised under the same or similar circumstances.

Negligence. Negligence is the want of ordinary care.

Contributory negligence. Contributory negligence means

negligence on the part of a person injured, either in person or property, which contributed in any way or in any degree directly to the injury.

[266] Proximate cause. Proximate cause means the direct, efficient and producing cause without which the injury or loss complained of would not have occurred.

Burden of proof. Burden of proof is the obligation resting upon a party to prove the truth of an allegation made by him which is denied by his opponent.

Preponderance or greater weight of the evidence. When it is said that the burden of proof is upon a party to establish any fact or proposition by a preponderance or greater weight of the evidence, it means that the evidence in support thereof should produce a stronger impression upon the mind and be more convincing as to its truth and effect when weighed and considered against evidence introduced to the contrary. It does not necessarily mean the greater number of witnesses who testify upon either side of a given point, but the greater weight of the testimony. It is determined by fully and fairly considering and weighing testimony of each witness and the entire testimony of all the witnesses, giving to the testimony of each witness [267] such weight as you deem it entitled to receive when balanced against the other facts and circumstances proven upon the trial of the case.

Instruction No. 9

Evidence has been introduced in connection with defendant's claim that the coupler on the railroad car coupled automatically by impact, both prior and subsequent to the time of the accident.

The fact that the coupler performed perfectly, both before and subsequent to the accident, if such were true, would not constitute a defense if the plaintiff has established by a

preponderance of the evidence that this coupler failed to perform as required by law at the time of the incident in question. You may, however, consider such evidence with respect to the prior and subsequent efficient operation of the coupler in connection with all the other facts and circumstances shown by the evidence in determining the weight and credit which should be given to that evidence which may show or tend to show that the coupler was or was not placed in [268] a position to operate upon impact at the time its failure is claimed to have occurred.

(District Court of Linn County, Iowa)

VERDICT

(Filed in District Court February 1, 1967.)

We, the jury in the above-entitled case, find in favor of the defendant, Cedar Rapids and Iowa City Railway Company, a corporation, and against the plaintiff, Ronald E. Crane.

/s/ FORREST MCCALLEY

Foreman

TRANSCRIPT OF JUDGMENT

(In the District Court of the State of Iowa, in and for Linn County.)

BE IT REMEMBERED, That at a term of the District Court of Iowa, in and for Linn County, begun and held at the Court House in Cedar Rapids, Iowa on the 3rd day of January, A.D. 1967, present the Hon. Harold Vieter, Presiding Judge within and for the 18th Judicial District of said State, Kenneth L. Perry, Sr., Clerk of said Court, [269]

and Walter H. Grant, Sheriff, the following proceedings were had, done and entered of record, to-wit: Cause No. 81324, wherein Ronald L. Crane is Plaintiff and Cedar Rapids and Iowa City Railway Co. is defendant.

Judgment Docket Law 299, page 324, Linn County, Iowa.

Name of Party _____ Ronald L. Crane

Date of Judgment _____ Feb. 1, 1967

Judgment for Costs _____ \$267.59

Accrued Costs _____ \$ 74.40

REMARKS

State of Iowa, Linn County, ss.

I, Kenneth L. Perry, Clerk of the District Court, within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true, correct and complete copy of the Judgment Docket Entry, in the above entitled cause, as rendered by said District Court, as full, true, correct, and complete, as the same remains of [270] record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said District Court this 2nd day of August, A.D. 1967.

/s/ KENNETH L. PERRY, SR.

Clerk of said Court

The exhibits which were introduced at the time of trial are not reproduced at this point as provided in Rule 340(e). However, all exhibits which were identified by an exhibit number and received in evidence will be certified by the Clerk of the District Court of Linn County, Iowa, to the Supreme Court of Iowa for use by the Court at the time of the submission of the appeal.

(District Court of Linn County, Iowa.)

NOTICE OF APPEAL

(Filed in District Court February 24, 1967)

To: Cedar Rapids and Iowa City Railway Company, Defendant, and

Lynch, Dallas, Smith and Harman, William Dallas, John F. Gaston and Ted P. Lewis, [271] Attorneys for said Defendant, and

Kenneth L. Perry, Clerk of the District Court of Linn County, Iowa

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that the Plaintiff, Ronald L. Crane, has appealed and does hereby appeal to the Supreme Court of Iowa, from the verdict of the jury rendered in this cause, the judgment entered thereon on or about February 1, 1967, the orders of the Court on the trial of said cause withdrawing issues from the jury, refusing to give requested instructions, overruling objections to the instructions given, giving of the instructions submitted and overruling objections thereto, and also from each and every order, decision and ruling adverse to the Plaintiff made by said District Court during the pendency, progress and trial of this case.

Said appeal will come on for hearing and disposition in the Supreme Court of Iowa in accordance with the rules of said Court in its regular order.

Dated this 23rd day of February, [272] 1967.

JOHN B. HALLORAN

511 Minnesota Federal Bldg.

Minneapolis, Minnesota

ARTHUR O. LEFF

222 South Linn Street

Iowa City, Iowa

Attorneys for Plaintiff

/s/ ARTHUR O. LEFF

[OPINION AND JUDGMENT OF SUPREME
COURT OF IOWA.]

[160 N.W.2d 838.]

Ronald L. Crane,

Appellant,

vs.

Cedar Rapids and Iowa City Railway Company,
a Corporation,

Appellee.

No. 52991

Supreme Court of Iowa

Sept. 5, 1968

Action for injuries sustained when plaintiff fell from railroad boxcar: The Linn District Court, Thomas H. Nelson, J., entered judgment on jury verdict for defendant and plaintiff appealed. The Supreme Court, Stuart, J., held that, even if defendant railroad had violated federal Safety Appliances Act, submission of question of contributory negligence of plaintiff to jury was not improper.

Affirmed.

Rawlings and Becker, JJ., dissented.

Arthur O. Leff, Iowa City, and Halloran & Alfveby, Minneapolis, Minn., for appellant.

John F. Gaston, Jr., Ted P. Lewis, and Lynch, Dallas, Smith & Harman, Cedar Rapids, for appellee.

STUART, Justice.

Plaintiff brought this action in the Linn County District Court to recover damages for personal injuries received when he fell from a runaway railroad boxcar which he was at-

tempting to stop by applying the brakes. The railroad car had been delivered to Cargill, Inc. by defendant. Plaintiff, an employee of Cargill, was engaged in spotting cars for his employer at the time of the accident. He sought to impose liability on defendant by alleging it failed to have the cars equipped with couplers coupling automatically by impact as required by 45 U.S.C.A., §2. The case was submitted to the jury which returned a verdict for defendant. Plaintiff has appealed.

I. Plaintiff's first three errors relate to instructions given or requested instructions refused and depend upon his claim failure of the railroad equipment to perform as required by the Safety Appliance Acts (S.A.A.) 45 U.S.C.A. §§ 1-7, is in itself an actionable wrong which results in absolute liability and contributory negligence is no defense. It is our opinion the defense of contributory negligence was available to defendant and the instructions in this regard were correct.

[1] It is well settled the duty imposed on the railroads by the Safety Appliance Acts is "an absolute one and the carrier is not excused by any showing of care, however assiduous." *Brady v. Terminal R.R. Assn.*, 303 U.S. 10, 15, 58 S.Ct. 426, 429, 82 L.Ed. 614 (1937), and citations.

[2] It is also well settled "the nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to invoke its protection." *Brady v. Terminal R.R. Assn.*, *supra*, loc. cit. 14, 58 S.Ct. loc. cit. 429. The trial court ruled plaintiff was within the class of persons intended to be protected by the S.A.A. This holding is supported by the authorities and is not challenged here. *Boyer v. Atchison, Topeka and Santa Fe Railway Co.*, 38 Ill.2d 31, 230 N.E.2d 173; *Jacobson v. New York, N. H. & H. R. Co.*, 1 Cir., 206 F.2d 153;

Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 76 S.Ct. 386, 100 L.Ed. 364; *Brady v. Terminal R.R. Assn.*, *supra*; *Fairport R. Co. v. Meredith*, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446.

[3-5] Employees of carriers are given the further protection of the Federal Employers' Liability Act (F.E.L.A.). 45 U.S.C.A. Chapter 2. Employees may bring action for personal injury in either the federal or state courts. 45 U.S.C.A. §56. In actions under F.E.L.A. based on violation of S.A.A. the carrier may not invoke assumption of risk or contributory negligence as a defense. 45 U.S.C.A. §§53-54.

[6] Crane as a nonemployee is not entitled to the benefits of the F.E.L.A. and, as the S.A.A. does not provide a remedy, he brought his action in the state court subject to state law.

[7-9] An examination of the cases convinces us the Safety Appliance Acts impose an absolute duty on the railroad carrier to equip its cars as required by statute and failure of the safety appliance to so operate is negligence per se. In the absence of statutory state law to the contrary, the injured party is required to exercise due care for his own safety and under Iowa law his contributory negligence is a proper defense to be submitted to the jury.

The U. S. Supreme Court first considered the question in *Schlemmer v. Buffalo R. & P. Ry. Co.*, 220 U.S. 590, 31 S.Ct. 561, 55 L.Ed. 596 (1910). There the Pennsylvania trial court submitted the case to the jury under an allegation that defendant had violated 45 U.S.C.A. §2 by failing to have automatic couplers. The question of contributory negligence was included. The court pointed out that Congress had expressly provided the employee should not be deemed to have assumed the risk "[b]ut there is nothing in the statute absolving the employee from the duty of using ordinary care

to protect himself from injury in the use of the car with the appliances actually furnished." 220 U.S. at 596, 31 S.Ct. at 563.

"In the absence of legislation at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist, * * *." 220 U.S. at 597, 31 S.Ct. at 563.

"In view of this record we cannot say that the court, in denying a recovery to the plaintiff, upon the ground of contributory negligence of the deceased, denied to her any rights secured by the Federal statute." 220 U.S. at 598, 31 S.Ct. at 564.

In *Fairport P. & E. R. Co. v. Meredith*, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446 (1933), the Supreme Court held the duty imposed by the Safety Appliance Acts "in respect of power controlled brakes extends to and includes travelers at railway-highway crossings." 292 U.S. at 597, 54 S.Ct. at 829.

"* * * [T]he trial court instructed the jury, in effect, that, if the violation of the federal act resulted proximately or immediately in the injury complained of, the railroad company was liable. But the jury was also told that, if respondent was guilty of contributory negligence, she could not recover notwithstanding the negligence of petitioner." 292 U.S. at 593, 54 S.Ct. at 827.

The court said:

"The federal Safety Appliance Act, as we already have said and this court repeatedly has ruled, imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law. The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law." 292 U.S. at 598, 54 S.Ct. at 829.

In 1934, the U. S. Supreme Court reaffirmed its position with regard to the defense of contributory negligence in *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 216, 54 S.Ct. 402, 78 L.Ed. 755, and *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57, 61, 54 S.Ct. 573, 78 L.Ed. 1123.

In *Tipton v. Atchison, Topeka and Santa Fe Ry. Co.*, 298 U.S. 141, 146, 56 S.Ct. 715, 80 L.Ed. 1091 (1935), the court held California was at liberty to afford any appropriate remedy for breach of the duty imposed by the S.A.A. and could limit plaintiff's recovery to workmen's compensation. The court said:

"The Safety Appliance Acts impose an absolute duty upon an employer * * *. The absolute duty imposed necessarily supersedes the common-law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states. The Safety Appliance Acts modify the enforcement, by civil action, of the employee's common-law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act." 298 U.S. at 146, 56 S.Ct. at 716.

The U. S. Supreme Court has not overruled or modified these clear holdings. Plaintiff cites more recent cases which he claims show an inclination on the part of the court to treat absolute duty and absolute liability the same.

In *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 76 S.Ct. 386, 106 L.Ed. 364 (1955), a nonemployee sought damages for personal injuries sustained when a platform near the dome on a tank car broke causing him to fall. The main question was whether this platform was a safety appliance within the S.A.A. The only comment pertinent to

our problem here is found in the last paragraph of the opinion. The court said:

"There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under §2 of the Act. Having been upon the dome running board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. *Coray v. Southern Pacific Co.*, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208; *Brady v. Terminal Railroad Assn.*, 303 U.S. 10, 58 S.Ct. 426, 82 L.Ed. 614; *Fairport, P. & E. R. Co. v. Meredith*, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446; *Louisville & N. R. Co. v. Layton*, 243 U.S. 617, 37 S.Ct. 456, 61 L.Ed. 931." 350 U.S. at 325, 76 S.Ct. [386] at 391.

The authorities cited do not support the comment on absolute liability. The issue of contributory negligence was not in the case and was not mentioned in the opinion.

Three F.E.L.A. cases, *Carter v. Atlanta & St. Andrews Bay R. Co.*, 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); *O'Donnell v. Elgin J. & E. R. Co.*, 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187 (1949); and *Affolder v. N.Y.C. & St. L. R. Co.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); contain language which tends to support plaintiff's position, but the issue of contributory negligence was not mentioned.

Whether these cases are harbingers of a change in position by the U. S. Supreme Court or merely imprecise language which frequently appears in dictum, we do not know. The federal statutes have not been changed. The reasons for holding a nonemployee's action is governed by applicable state law seem sound and still exist. In any event, we do not consider it our prerogative to place an interpretation on the federal statutes which differs from that of the U. S. Supreme Court. No one claims contributory negligence is not a defense under Iowa law.

Other federal courts have consistently held contributory negligence is available as a defense in S.A.A. cases if the state law so provides.

In *Hartley v. Baltimore & O. R. Co.*, 3 Cir., 194 F.2d 560, 563 (1952), the court said:

"The express exception and the only exception is where, as above stated, an employee is suing his employer under the Federal Employers' Liability Act and violation of a safety statute enacted for the benefit of employees contributed to the injury. * * *"

"In any event the case against Baltimore and Ohio was tried and decided as a diversity suit and not under the Federal Employers' Liability Act. The only negligence finally pressed against Baltimore and Ohio was its alleged violation of the Federal Safety Appliance Act which as we have seen does not exclude the defense of contributory negligence. The court expressly charged that Hartley was not an employee of the Baltimore and Ohio and that the Federal Employers' Liability Act had no application to his claim against that railroad. The applicable state law was that of Pennsylvania and under that law contributory negligence is a valid defense though there has been a violation of a statute enacted for the safety of employees." 194 F.2d at 563.

In *Jacobson v. New York, N. H. & H. R. Co.*, 1 Cir., 206 F.2d 153, 157, the court said:

"But it is abundantly clear that the federal courts have not, as a matter of federal common law, developed a private right of action for damages for personal injuries resulting from a breach of the Safety Appliance Acts, in favor of persons not entitled to sue under the provisions of the Employers' Liability Acts."

"It follows, therefore, that if an action is brought in a state court by a passenger or other person not entitled to sue under the Employers' Liability Acts to recover damages for personal injury resulting from a violation of the Safety Appliance Acts, issues bearing upon the right to recover, relating, for example, to common law doctrines of last clear chance, the defense of contributory

tory negligence, or proximate cause, depend upon the local law of the state where the injury occurred, and do not present federal questions reviewable by the Supreme Court under 28 U.S.C. §1257(3)." 206 F.2d at 157.

"It follows also, that if such an action is brought in or removed to a federal district court on grounds of diversity of citizenship, the substantive law to be applied, in determining the right to recover, is the statutory or common law of the state." 206 F.2d at 157.

In *Hunter v. Missouri-Kansas-Texas Railroad Company*, 276 F.Supp. 936, 943 (1967), the U. S. District Court in Oklahoma said:

"* * * where the plaintiff is not an employee of the Katy Railroad, that the Katy Railroad may assert the defense of contributory negligence with reference to its alleged violation of the Federal Safety Appliance Act and if the plaintiff is guilty of contributory negligence he may not recover against the Katy Railroad for either any common law negligence on its part or any violation by it of a provision of the Federal Safety Appliance Act."

"In view of this finding and the state of the law to the effect that this defense is available in this case to Katy Railroad under both counts against it, namely, a violation of the Federal Safety Appliance Act and common law negligence in delivering a defective car to the Halliburton Company siding for unloading by its employees, the Court finds and concludes that the plaintiff is, therefore, not entitled to recover herein against Katy Railroad by virtue of said contributory negligence on his part as found by the court under the evidence." 276 F. Supp. at 944.

Plaintiff has cited no cases from any courts which specifically considered the question of contributory negligence and held differently from the U. S. Supreme Court. *Boyer v. Atchison, Topeka and Santa Fe Ry. Co.*, 38 Ill.2d 31, 330 N.E.2d 173, 176 (1967), is the most nearly in point. There the Illinois court affirmed judgment on the pleadings on the

question of liability in a suit by a nonemployee under the S.A.A. The court said:

"Thus, it is apparent that a breach of the Safety Appliance Act does give rise to a civil cause of action which is separate from any cause of action based on negligence and that absolute liability for such breach is imposed on the violator."

Contributory negligence was not an issue. The question was whether the employee was in the protected class. The same year a federal court in *Hunter v. Missouri-Kansas-Texas Railroad Company*, supra, specifically confirmed the past precedents.

Louisell and Anderson in an article in 18 *Law and Contemporary Problems* 281-295 argues persuasively that a railroad employee and the employee of a shipper injured while setting a defective hand brake should not be treated differently. The obvious answer is that the federal statutes as interpreted by the U. S. Supreme Court make such distinction. "If, * * * conditions have come into existence which call for a change in the rule that is not a matter for this court but for the Congress." *Hartley v. Baltimore & O. R. Co.*, 194 F.2d 560, 563.

[10] We do not believe the U. S. Supreme Court has altered its interpretation of the Federal Safety Appliance Acts, 45 U.S.C.A. Chapter 1 and the Federal Employer's Liability Act, 45 U.S.C.A. Chapter 2. Until they do or until Congress amends the statutes, we will hold with existing precedents. The trial court correctly submitted the question of plaintiff's contributory negligence to the jury. There is no merit in plaintiff's first three assignments of error.

II. Plaintiff's next assignment of error is founded upon the trial court's exclusion of certain evidence. In order to understand the significance of the excluded testimony it is

necessary to briefly describe circumstances surrounding the accident.

Crane was employed by Cargill, Inc. as a meal house helper. He helped move railroad cars between the meal house where they were loaded and the elevator and scales to the north where they were weighed before and after loading. The track between the meal house and the scales was slightly lower than at either of these facilities. The cars were moved by cables attached to electric winches. Because of the saucer effect, gravity aided the movement. Three Cargill employees testified that prior to the date of the accident they had seen cars running free from the meal house to the elevator roll all the way to the elevator and partly on the scale.

On the day of the accident, Crane and a fellow employee moved the two north cars from a string of six cars located south of the meal house to the scales to be weighed before loading. The brake had been set on the third car and the pin lifted on the coupler to release the two cars from the chain.

After weighing they were winched back and supposedly coupled to the original group before the first car was loaded. After the first car was filled, Harris instructed Crane to get on top of the third car and work the brake in a manner to spot the second car in the chain for loading. Harris attached the winch to the second car. Although Crane and Harris said the second and third cars appeared to be coupled together, the first two cars "took off quite rapidly" from the standing string back toward the elevator and scales when Harris started the winch.

Crane reset the brake on the third car, climbed down the ladder, ran and caught up with the two runaway cars after they had traveled about a length and a half, climbed up on the south end of the second car, and started operating the brake. He fell off the brake platform landing on the cement

apron between the tracks approximately 10'-14' below smashing both heels.

Crane testified:

"* * * the thought in my mind was to get these cars stopped before they had any chance to get down to the other cars sitting down on the scale where to the best of my knowledge there were people in this car, and I did my best to get these cars stopped before they could get down there, * * *"

He also testified:

"At that time or prior to that I had observed a car in the elevator scale area. Cargill conducts unloading operations at the scale. Cars are brought in, loaded on the bean track, and brought into the meal house track at the elevator for unloading. When these two cars broke away I observed a car in the elevator area. Whenever there is a car on the scale it is presumed that somebody is inside working. I assumed there were people inside unloading this car.

"When the two cars broke away, I observed Harris start running toward the far end of the cars. At this time there was a grade in the track, which goes down from the meal house to the elevator. My immediate reaction was to get these cars stopped before they could get to the elevator because of people possibly down in this car working."

Later in plaintiff's testimony there is the following record:

"Q. Yes. Now I will ask you, Mr. Crane, that if prior to the occurrence of your accident on March 21st, 1963 you had ever seen cars being cut off or pulled from the meal house track where they did not stop in the saucer but proceeded down all the way to the elevator? Have you seen that? A. No, sir.

"Q. You had not seen that? A. No, sir.

"Q. Had you heard of them doing that? A. Yes, sir.

"Mr. Dallas: Objected to as calling for hearsay and immaterial.

"The Court: Sustained."

It is the exclusion of this evidence upon which plaintiff seeks reversal.

We believe it was error to exclude the proffered testimony as hearsay, but hold under the record that it was not prejudicial to this plaintiff because the answer was permitted to stand.

[11] "Hearsay evidence has been defined as testimony in court or written evidence of a statement made out of court; such statements being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. McCormick, Evidence, page 460." Daniels v. Bloomquist, 258 Iowa 301, 312, 138 N.W.2d 868, 875.

[12] The foregoing testimony was not offered to prove the truth of matters asserted. It was offered to show the reason Crane chased the cars in an effort to stop them.

"Wherever an utterance is offered to evidence the *state of mind* which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, * * * and thus the hearsay rule interposes no obstacle to the use of * * * oral informations * * * or any other form of verbal utterances by one person, as circumstantial evidence that *another person had knowledge* or belief as to * * * the *dangerous condition* of a place or a machine." Wigmore on Evidence, 3rd Ed., Vol. VI, Sec. 1789, pp. 235-237. See also: 29 Am. Jur.2d 404-407, Evidence, §§ 355-357; 31A C.J.S., Evidence §257, pp. 676-678.

[13] However, the question was answered before the objection was sustained. Defendant did not state reasons for the belated objection and did not move to strike the answer. As the answer was allowed to stand, the ruling did not have the effect of striking the testimony and it remained in the record for consideration and plaintiff was not prejudiced by the ruling. Oakes v. Peter Pan Bakers, Inc., 258 Iowa 447,

451, 138 N.W.2d 93, 96; Correll v. Goodfellow, 255 Iowa 1237, 1247, 125 N.W.2d 745, 751; Hamdorf v. Corrie, 251 Iowa 896, 903, 101 N.W.2d 836, 840; Ducummon v. Johnson, 242 Iowa 488, 496, 47 N.W.2d 231, 236; Livingstone v. Dole, 184 Iowa 1340, 1343, 167 N.W. 639, 641; Marple v. Ives, 111 Iowa 602, 603, 82 N.W. 1017.

III. Plaintiff claims the trial court abused its discretion in refusing to allow him to reopen his case to offer certain evidence after he had rested, but before any of defendant's evidence had been introduced. His position is that it explained the following testimony given on cross examination.

"During the accident movement, when the two cars began to move away, I set the brake on the third car, climbed down the ladder, overtook the southernmost of the two moving cars, got up on the brake platform, was engaged in turning the brake wheel on that car when for some unknown reason I lost my balance.

"Q. That's right. And you told us before for some unknown reason you lost your balance, isn't that true?

"A. Yes, sir, I don't know the reason why.

"Q. That's right. And you told us before there was nothing gave way on that car that caused you to fall?

"A. No, sir."

Plaintiff in his motion to reopen indicated he wanted to read the following excerpt from his own discovery deposition:

"Q. Do you know exactly what it was that caused you to fall? A. Yes, it was the hurry that caused me to fall.

"Q. There wasn't any defect give way on any car or anything like that, was there? A. Well, by anything being at fault, I will say it was because of the situation that I was in such a hurry to get the car stopped so nobody else would get hurt. I didn't think about myself."

The trial court refused to allow plaintiff to reopen his case to present this proffered evidence.

[14, 15] It is doubtful that this evidence was admissible in the form offered, but we need not resolve this question as the trial court was well within his discretion in refusing to permit plaintiff to reopen. We will not interfere with such ruling unless there was a clear abuse of discretion. *Spry v. Lamont*, 257 Iowa 321, 336, 132 N.W.2d 446, 454; *Robson v. Barnett*, 241 Iowa 1066, 1071, 144 N.W.2d 382, 384; 53 Am. Jur. 109, Trial §123.

IV. Plaintiff contends the trial court erred in sustaining objections to certain evidence offered in rebuttal. Defendant had introduced evidence that the maximum speed attained by cars being winched from the meal house dock to the elevator and scales was 1.79 miles per hour. Evidence was also introduced that it took longer to set the brakes on some cars than on others.

On rebuttal plaintiff testified these two cars "took off faster than a walk" and seemed to be moving away "pretty quickly" and that the speed of the cars depended upon a number of factors which he listed.

He also testified that it "varies on how fast you can get the cars stopped, the type of brake, not necessarily the type of brake, it's just some have got more slack in them than others." He was not permitted to answer the following questions:

(1) "What effect, if any, did the speed of these cars, as you observed it, have on your conduct?"

(2) "At the time you attempted to set the brake * * * on Car No. 2, what effect if any did this fact [variance in time to set brakes] have upon your state of mind?"

He was not permitted to introduce the following excerpt from his own discovery deposition: "I said if I had been walking then the situation wouldn't have been there because I wouldn't have tried to stop those cars if there hadn't been a chance of somebody getting seriously injured."

[16, 17] The trial court has considerable discretion in determining what is rebuttal evidence. Robson v. Barnett, 241 Iowa 1066, 1071, 44 N.W.2d 382, 384, and citations. The trial court was justified in ruling this evidence was not rebuttal. It was an attempt to prove on rebuttal that plaintiff was hurrying to stop the cars before someone was hurt. It did not attempt to disprove any of the matters introduced by defendant.

We have already said the trial court did not abuse its discretion in failing to allow plaintiff to reopen to offer similar evidence as part of his main case.

For the reason stated herein, we find no reversible error and the trial court is affirmed.

Affirmed.

All Justices concur except RAWLINGS and BECKER, JJ., who dissent.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 791

RONALD L. CRANE,

Petitioner,

vs.

CEDAR RAPIDS AND IOWA CITY
RAILWAY COMPANY,

Respondent.

STIPULATION OF CONTENTS OF
SINGLE APPENDIX

IT IS HEREBY STIPULATED AND AGREED between the parties hereto, through their respective counsel, that the Single Appendix in the above matter will include:

1. Those portions of the Abstract of Record in the Supreme Court of Iowa which appear on the following pages and line numbers, all inclusive: Page 4, line 27, to page 22, line 8; page 23, line 7, to page 23, line 30; page 29, line 3, to page 33, line 1; page 34, line 30, to page 179, line 1; page 182, line 1, to page 234, line 26; page 238, line 14, to page 245, line 7; page 249, line 32, to page 272, line 13; and

2. The opinion and judgment of the Supreme Court of Iowa, filed September 5, 1968.

Dated this 27th day of January, 1969.

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